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Secession From the European Union: Checking Out of the Proverbial “Cockroach Motel”

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Raymond J. Friel

Abstract

This Article examines the likelihood of secession from the Union and whether or not it legally possible. It asks what process would have to be invoked and examines the role and function of a European army in secession and whether such an army may be called upon to intervene to prevent secession. This Article, finally, looks at the current proposals being discussed in regards to reforming the Union.

SECESSION FROM THE EUROPEAN UNION: CHECKING OUT OF THE PROVERBIAL “COCKROACH MOTEL”

*Raymond J. Friel**

INTRODUCTION

Headline: “Union Troops today stormed the capitol building, forcing the last rebel troops into an unconditional surrender. The secessionists have been roundly defeated.”

One could apply that sort of headline to far too many internal State conflicts. It is also likely that one will continue to be able to use that sort of headline for a long time to come. On a “what if . . . ?” scenario, could those Union troops belong to the European Union (“EU” or “Union”), and could the capitol building refer to the Houses of Parliament in Westminster, the Bundestag in Berlin, the Sejm in Poland? This Article seeks to examine the legal issues that could lead to such a scenario.

One of the most fundamental questions, yet also one of the most ignored within the EU, is whether the EU is the archetypal cockroach motel: a motel where you can check in, but not check out. In an era when most of the focus is on preparing for a rapid and dramatic enlargement of the Union from fifteen States to a potential of twenty-seven over the next ten years, little has been said on the question of whether, once an applicant State has joined the Union, it can subsequently leave, and if it

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can leave, under what legal process it may do so.¹ Yet an enlargement of the nature envisaged, bringing as it does a radically different set of cultural, political, legal, and economic values and mores, may be more likely to give rise, in the not too distant future, to the potential of a Member State seeking a renegotiation of the relationship between that State and the Union, if not complete withdrawal from the Union.

Without even looking at the new applicant States, such a possibility has often been raised with respect to the United Kingdom.² In recent times, individual members of the U.K. Parliament have tabled secession legislation, authorizing the government to negotiate for withdrawal from the Union.³ The Iraq crisis and the deep divisions between the United Kingdom, France, and Germany also give cause for concern.⁴ As the Union moves closer towards integration between States that have fundamentally different global outlooks, the internal tensions that will naturally arise may provide insurmountable problems to a Member State. Furthermore, the United Kingdom cannot be singled out as the only possible difficulty — the Iraq crisis has demonstrated a split between the Franco-German monolith and other powers such as Spain, Italy, and the United Kingdom.⁵

1. Greenland did leave the Union in 1985 following the unanimous agreement of the Member States to an amendment of the Treaties giving Greenland overseas countries and territories (hereinafter OCT) status. See Friedl Weiss, *Greenland's Withdrawal from the European Communities*, 10 EUR. L. REV. 173 (1985). However, the Greenland situation is not fully analogous to the withdrawal of a full Member State, as Greenland is effectively an overseas colony of Denmark. *Id.* at 173-74. In 1972 Greenland voted against joining the European Union ("EU," the "Union," or EEC, as it was then), but since Denmark voted to join, Greenland had little option but to follow. See *id.* at 176 (explaining that a majority of Danish voters opted for accession, but about 71% of voters in Greenland voted against accession). Following substantial conferral of home rule to the newly Greenland Parliament, a further referendum saw Greenland confirm its desire to leave the EU. *Id.* at 175-76. In the interests of de-colonization, it was not unsurprising that the other Member States conceded generous withdrawal terms. See *id.* at 179-82 (discussing the terms of the EU's offer to Greenland).

2. The divergence with respect to foreign policy and the closer relationship between London and Washington, D.C., particularly over the situation in Iraq, neatly demonstrates a divergence within Europe with respect to foreign affairs. See *Iraq Rift Overshadows EU Summit*, BBC NEWS, May 5, 2003, at <http://news.bbc.co.uk/2/hi/europe/2951647.stm> [hereinafter *Iraq Rift*].

3. See European Union (Implications of Withdrawal) Bill [H.L.], H.L. BILL 7 (Rev) (2000).

4. See *Iraq Rift*, *supra* note 2.

5. See *Europe and Iraq: Who Stands Where?*, BBC NEWS, Jan. 29, 2003, at <http://news.bbc.co.uk/1/hi/world/europe/2698153.stm> (stating that France, Germany,

For new applicant States, the possibility of withdrawal is perhaps even more likely, given the fluid nature of their economic and social structures and the inherent ethnic tensions among many of these States, some of which are artificial creations.⁶ Might a huge economic shock to the Union, perhaps from a violent conflagration in the Middle East, put intolerable strains on the social fabric of many of these new applicant countries? Certainly in such a scenario, one can envisage the Union taking dramatic steps in terms of financial and material aid to avoid this consequence, but imagine that it is all to no avail, or that the price is simply too high — that it is a burden the Union is unable, or unwilling, to undertake. Imagine then the unimaginable: that Member State X seeks to withdraw from the Union.

There are a number of issues that arise in such a scenario. First, how likely is secession from the Union? Second, if there is a factual possibility of secession, is it legally possible? Third, if it is legally possible, what process would have to be invoked? Fourth, if secession rights of the States are limited, to what extent does this impact upon the role and function of a European army, and could such an army be called upon to intervene to prevent secession? Finally, in reforming the Union, what are the current proposals being discussed, if any? This Article deals with each of these points in turn.

I. *IS SECESSION LIKELY?*

One of the first arguments that must be disposed of, if this Article is to provide anything more than an academic equivalent of the “Twilight Zone,” is whether the issue of secession⁷ could

Belgium, and Luxembourg are all opposed to the Iraq War); *Dutch Debate Iraq Involvement*, BBC News, Aug. 28, 2003, at <http://news.bbc.co.uk/1/hi/world/europe/3189921.stm> (stating that the Netherlands has not sent troops to Iraq).

6. They are artificial creations at least in terms of lines on a map. Much is made of the colonial powers to simply create new States in Africa and Asia by simply drawing lines in the sand regardless of tribal loyalties or community rivalries. See generally L.H. GANN & PETER DUIGAN, *COLONIALISM IN AFRICA 1870-1960* (1973); JOHN D. HARGREAVES, *WEST AFRICA PARTITIONED VOL. II: THE ELEPHANTS AND THE GRASS* (1985); ROBIN BROOKE-SMITH, *THE SCRAMBLE FOR AFRICA* (1987). However, this is very much the European experience in their homeland as well. See NORMAN DAVIES, *EUROPE: A HISTORY* (1998).

7. While the term often used with respect to departure from the Union is “withdrawal,” this Article uses the term “secession.” The difference is important: “Withdrawal” simply means “the act of retreating from a place, position, or situation.” See BLACK’S LAW DICTIONARY 1594 (7th ed. 1999) (defining “withdrawal”). “Secession,” on

in any way become a reality within the Union. There is an old Irish adage that talks about the dynamics of group associations. The thrust of the adage is that having finally agreed to form a group, the very first agenda item for the group is: the split. Although Irish history is undoubtedly littered with such eventualities,⁸ it is hardly the case that somehow the Irish are indeed substantially more likely to "split" than any other grouping.

How likely is it that any of the Member States of the Union would seek to withdraw from the Union? If the answer is exceptionally unlikely, then the issue of secession becomes a hypothetical not worthy of analysis, similar to an argument about what would happen if the sun did not come up tomorrow. However, there are many telling portents that the potential of a State seeking to withdraw from the Union is not merely likely but inevita-

the other hand, has particular political connotations: "the process or act of withdrawing, esp. from a religious or political association." *See id.* at 1353 (defining "secession"). The use of "secession" therefore implies that the Union is a State, with all the relevant emotional and political baggage that it entails. The use of the term secession is preferred throughout the Article for a variety of reasons. First, the Union does have legal personality. *See* Consolidated version of the Treaty on European Union, art. 24, O.J. C 325/5, at 18-19 (2002), 37 I.L.M. 67 (ex Article J.14) [hereinafter Consolidated TEU], *incorporating changes made by* Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Feb. 26, 2001, O.J. C 80/1 (2001) [hereinafter Treaty of Nice] (amending Treaty on European Union ("TEU"), Treaty establishing the European Community ("EC Treaty"), Treaty establishing the European Coal and Steel Community ("ECSC Treaty"), and Treaty establishing the European Atomic Energy Community ("Euratom Treaty") and renumbering articles of TEU and EC Treaty). Furthermore, since it can hardly be described as a corporation, this legal personality must be more analogous with that of a State. Second, the term "withdrawal" does not accurately reflect the seriousness or difficulty that the action would involve. Finally, the preference to use "withdrawal" is simply a refusal to deal with the issue as to whether the Union is in fact a State in the accepted sense of the word. However, the argument becomes circular: one way we could tell if the Union is a State would be how difficult it is to leave the Union. Terminology on leaving is not that which defines whether the Union is a State or not but rather how, if at all, leaving is to be achieved. No prohibition on departure would indicate that the Union is not a State as we currently understand that concept; prohibited or limited departure would indicate it is far closer to a State than many recognize.

8. The foundation of the Irish State itself is a classic example. *See generally* OXFORD COMPANION TO IRISH HISTORY (S.J. Connolly ed., 2002). First, there were those who wanted to "split" from the United Kingdom. *See id.* at 542. Then, following negotiations securing a twenty-six and not thirty-two county "split," those who fought the Anglo-Irish War "split" into two groups, Sinn-Féin, which was for the Anglo-Irish treaty, and the Irish Republican Army ("IRA"), which was against it. *See id.* at 16, 277. Over time, the IRA again "split" into the Provisional IRA and the Official IRA. *See id.* at 284. Even today, the Provisional IRA went on ceasefire, immediately causing a split into the Real and Continuing IRA in 1995. *See id.*

ble at some stage in the not-too-distant future. And those portents come not merely from outside Europe but from within Europe itself. Indeed a quick survey of European history is illustrative in that regard.

Within a European context, we need to look at the problem of secession through a historical backdrop of an endemic lack of constitutional, political, and legal constancy in the European mainland.⁹ Political structures in Europe have not long endured since the days of the Roman Empire.¹⁰ France, for example, has undergone one monarchy, one empire, and five republics.¹¹ Further, its geographic borders have been similarly fluid.¹² European history is littered with failed groupings such as the Holy Roman Empire, the Austro-Hungarian Empire, Prussia, and so forth. And who remembers the Ottoman Empire?¹³ Europe has seen the establishment of artificial States such as Belgium to keep the warring factions opposed.¹⁴ In the middle of the last century, the stability of the Nation State has been severely jolted. There was a serious proposal for Union between the United Kingdom and France, previously sworn enemies, in the face of Nazi Germany's wartime successes.¹⁵ After World War II, Europe underwent the redrawing of physical borders and the creation of new artificial States in a vain attempt to mask racial and ethnic divides.¹⁶ The collapse of Yugoslavia¹⁷ and the break up of

9. See ASA BRIGGS & PATRICIA CLARIN, *MODERN EUROPE 1789-1989*, at 1-9 (1997) (describing the constancy of flux in Europe).

10. See DAVIES, *supra* note 6, at 15, 20 (describing ephemeral nature of Europe since the fall of the Roman Empire).

11. See generally W. SCOTT HAINE, *THE HISTORY OF FRANCE* (2000).

12. See *supra* note 4 and accompanying text (discussing the historical practice of political boundary lines in colonial Africa and also in Europe).

13. Today the Ottoman Empire is better known as Turkey. See generally HALIL INALCIK & DONALD QUATAERT, *AN ECONOMIC AND SOCIAL HISTORY OF THE OTTOMAN EMPIRE 1300-1914* (1994).

14. Belgium declared independence in 1830. See DAVIES, *supra* note 6, at 804 (describing creation of Belgian State).

15. See generally PETER STIRK & DAVID WEIGALL, *THE ORIGINS AND DEVELOPMENT OF EUROPEAN INTEGRATION* (1999); HENRY B. RYAN, *THE VISION OF ANGLO AMERICA* (1987) (providing an alternative proposal for the union of the U.K. and the United States).

16. See The Avalon Project at Yale Law School, *Protocol of Proceedings of Crimea Conference*, available at <http://www.yale.edu/lawweb/avalon/wwii/yalta.htm> (last visited Dec. 20, 2003).

17. See generally CHRISTOPHER BENNETT, *YUGOSLAVIA'S BLOODY COLLAPSE: CAUSES, COURSE AND CONSEQUENCES* (1995).

Czechoslovakia¹⁸ are fairly recent examples of this doomed enterprise. The list could go on, but the point would remain the same. In the European context, the one thing we can be certain of is uncertainty itself.

A counter argument might be that the Union represents a new departure from the history of Europe. Finally, or so the claim goes, Europe has reached a point where it has learned from the lessons that history has all too often taught with an unnecessary degree of barbarism. Let us analyze this argument. How stable is the Union today? Is it so stable that it can overcome the experience of its history?

To answer this question we need to understand why federations fail, and why elements secede from a State. Sunstein postulates that there are five principle reasons:¹⁹ first, repression or substantial infringement of civil rights;²⁰ second, economic self-interest;²¹ third, economic exploitation;²² fourth, injustice in the original acquisition;²³ and finally, cultural and ethnic differ-

18. See generally *THE END OF CZECHOSLOVAKIA* (Jiri Musil ed., 1995).

19. See Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 654-56 (1991) (arguing that an express constitutional right to secede is inappropriate and that secession rights should generally not be recognized); but see K.C. WHEARE, *FEDERAL GOVERNMENT* 85-87 (4th ed. 1964) (arguing that a right to secede unilaterally is not inconsistent with the federal principle).

20. See Sunstein, *supra* note 19, at 655-59. Curiously, the Article suggests only the former Soviet Union as a concrete example of where such infringements of basic civil rights could be argued. See *id.* It seems that Sunstein views the infringement of civil rights as more likely to take place generally across the federation than be confined to any specific sub-unit such as a cultural or ethnic group. Perhaps the negative treatment of Catholicism by the United Kingdom with respect to the Irish sub-unit, which was followed by Irish secession, would be an example of this. Although the infringement of the civil rights of Catholics generally applied throughout the United Kingdom, it did indeed bear more heavily on Ireland, as opposed to the other constituent elements (England, Scotland, and Wales), because the Irish sub-unit was predominantly Catholic.

21. See *id.* at 659-60. The Article suggests economic self interest as a factor in the demise of Yugoslavia in its pre-secession period. See *id.* Economic self interest presupposes that the sub-unit seeking to secede perceives that its membership in the federation constitutes a drain on its economic wealth, particularly in the redistributive mechanism common to most federations. The author rightly points out that the actual economic benefit from secession (presumably, the lack of wealth redistribution) would need to be carefully weighed against the costs of secession. See *id.*

22. See *id.* at 660-61. The economic exploitation argument is the flip side of the earlier argument of economic self interest. Whereas economic self interest looks at the benefits of leaving the federation, economic exploitation looks at the costs of remaining in the federation. Again, Yugoslavia and Czechoslovakia are interesting examples.

23. See *id.* at 661-63. Sunstein cites the forceful incorporation of Lithuania into the Soviet Union as an example. See *id.* However, the issue, then, is not really secession,

ences.²⁴ While these reasons provide a foundation on which to lay practical grounds for secession, it may not be, nor does the author claim it to be, either exhaustive or exclusive. The reasons why federations fail might also be grouped into economic, political, and cultural reasons.

Federations fail economically when they do not provide equal economic benefits to the component parts of the federation. This is not to suggest that all sections of the federation should benefit equally; rather, the benefits should be shared equitably, or at the very least, they should not be the subject of significant imbalances between the component parts. Most federations provide redistributive mechanisms,²⁵ and these can often be the source of tension, either because they are viewed as too generous or not generous enough. Either way, when there is a lack of economic equity within a federation, the federation is more likely to fail.

Federations also fail for a myriad of political reasons. First, component parts of the federation may not perceive that they have adequate representation within the federation's institutions. Some component parts may even feel that others are over-represented.²⁶ Second, the relationship between the scope of the federation and the power of the component parts may give rise to a perception that there is too little local power and re-

but liberation, as the "federation" is in reality an occupying force. The author disavows the propriety of secession in this scenario, but fails to deal with the concept that this actually could be viewed as liberation. *See id.*

24. *See id.* at 664-66. The author uses the former State of Czechoslovakia as an example of cultural and ethnic diversity being used to justify secession. *See id.* Notably, the distinction drawn is between the agricultural, devoutly Roman Catholic Slovakia, and the Czech Republic. Sunstein again argues that such an argument lacks any valid political morality that would support secession. *See id.*

25. See Laurent Guihery, *An Economic Assessment of German Fiscal Equalization Schemes since 1970: What Prospects for a Unified Germany?*, in 1 *Public Finance and Management* 393-419 (2001), available at http://www.spaef.com/PFM_PUB/v1n4/v1n4/v1n4_guihery.html.

26. For example, within the United Kingdom, the per capita representation in the House of Commons is substantially better for Scotland and Wales than it is for England. Note also that there have been a large number of Prime Ministers from Scotland (Tony Blair, Ramsay MacDonald, Sir Henry Campbell-Blennerman, and Arthur James Balfour) and Wales (David Lloyd George), and even Canada (Andrew Bonar Law, born in Canada of Scottish parents), although never Ireland! *See generally* 10 Downing Street, *Prime Ministers in History*, at <http://www.number-10.gov.uk/output/page123.asp> (last visited Dec. 20, 2003).

sponsibility.²⁷ Finally, a component part may resent that control over its local issues is being delegated to the federation, while another component part enjoys local autonomy.²⁸

Cultural differences are perhaps the most dangerous to the maintenance of any federation. Unless there is a workable compromise that seeks to accommodate cultural differences within the federation, the federation is not sustainable. One has to take a wide interpretation of the term "cultural" so as to include religious, historical, political, and other differences.

Could any of these grounds apply to the current Union? The answer is yes. There are two ways to examine the Union's situation: first, by surveying some examples from within the Union itself, and second by surveying possible difficulties arising from the applicant States. With respect to the former, the budget dispute between the United Kingdom and the Union is a classic example of an economic ground for secession.²⁹ The United Kingdom felt that it was contributing substantially in excess of the benefit it was receiving. After considerable tension, the United Kingdom and the Union negotiated to deal with this difficulty. However, the compromise might just as easily have failed if the ultimate proposal was too far away from either party's bottom line. In terms of political grounds, recent arguments over the composition of the Commission and the impact of States not having an automatic right to appoint a commissioner illustrate an issue of political representation within the Union institutions that has to be resolved.³⁰ Culturally, the di-

27. During the 1800s, the dominant issue in the "Irish Question" was not secession, but Home Rule, meaning greater local responsibility and power with less interference from Westminster. See OXFORD COMPANION TO IRISH HISTORY, *supra* note 8, at 257-58. Arguably, had Home Rule been conferred on Ireland at that time, secession might never have happened. When Home Rule was conferred on Ireland in 1914, to take effect after World War I, it was too little too late. See *id.* at 258.

28. For example, the so-called "West Lothian" question in the United Kingdom refers to the following issue: if Scotland has an assembly which has power to legislate over its local affairs, and if England does not have a similar assembly, but receives legislation from Westminster, then local decisions in England are being made with Scottish input whereas local Scottish decisions are not subject to English input. See Philip Cowley, *Legislatures and Assemblies*, in DEVELOPMENTS IN BRITISH POLITICS 120-22 (6th rev. ed. 2002) (providing a concise overview of the "West Lothian" question). The argument is mostly made either to deny regional assemblies or to advocate for an English assembly. See *id.* The current devolution provisions maintain the dichotomy, and there is no provision for an English assembly as yet. See *id.*

29. See Sunstein, *supra* note 19, at 660-61.

30. See EC/IGC/CONF/3900/96 (Sept. 10, 1996). For a good analysis of institu-

vergence between the United Kingdom and the rest of Europe, in particular France and Germany, is quite significant.³¹ The relationship between the United States and other Member States is surely an example of cultural divergence, particularly the historic and political bond between the United Kingdom and the United States, which is not shared by France or Germany.³² In recent times, the election and inclusion of a far right party into the national government of Austria³³ resulted in an ostracization of that country within the Union for a substantial period of time.³⁴ Is this but a few steps away from removing "undesirables" from power in Austria? If so, is this not the early equivalent of the potential for secession?³⁵

Of course, as was pointed out earlier, federations do not tend to break up over a single event or cause, but instead the difficulties are composite difficulties. It is a mixture of economic, political, and cultural issues that bring such federations to grief. Perhaps an interesting issue is that of tax competition within the Union.³⁶ Economically, politically, and culturally, tax competition (with the assumed concept of low taxation) is important to the United Kingdom but significantly less important to many other countries within the Union. The importance to

tional reform within the Union, see VAUGHNE MILLER, INSTITUTIONAL REFORM IN THE EU (House of Commons, Research Paper 99/54, 1999), available at <http://www.parliament.uk/commons/lib/research/rp99/rp99-054.pdf>.

31. See *Iraq Rift*, *supra* note 2.

32. See David Watt, *Introduction: The Anglo-American Relationship*, in THE "SPECIAL RELATIONSHIP": ANGLO-AMERICAN RELATIONS SINCE 1945, at 1-14 (Wm. Roger Louis & Hedley Bull eds., 1986) (distinguishing between the particular U.S.-U.K. relationship and the U.S.-German and U.S.-French relationships).

33. BULLETIN QUOTIDIEN EUROPE, No. 7645, Jan. 31 - Feb. 1, 2000, at 9.

34. See Republic of Austria, *EU 14: End of Sanctions Against Austria*, NEWS FROM AUSTRIA, Nr. 18/2000, Sept. 13, 2000, at http://www.austria.gv.at/aktuell/database/informationen/english/20000913_18.html; Eugene Regan, *EU Sanctions Against Austria*, 5(6) TBR 290 (2000).

35. Predominantly as a result of the difficulties raised by the Austrian situation, subsequent Treaty amendments have stressed the need for a commitment to fundamental democratic values from all States. See Consolidated TEU, *supra* note 7, art. 6, O.J. C 325/5, at 11-12 (2002), 37 I.L.M. at 69 (ex Article F). See generally Amaryllis Verhoeven, *How Democratic Need European Union Members Be? Some Thoughts After Austria*, 23 EUR. L. REV. 217 (1998).

36. See generally A Package to Tackle Harmful Tax Competition in the European Union, COM(97)564 Final (Nov. 1997); Towards an Internal Market without Tax Obstacles: A Strategy for Providing Companies with a Consolidated Corporate Tax Base for their EU-Wide Activities, COM(2001)582 Final (Oct. 2001).

the United Kingdom is based on all three elements,³⁷ not a single element, which thereby makes difficulties in this area more intractable.

The next issue is whether applicant States might have particular issues that could give rise to tension and a call for secession. Let us look at one applicant State: Turkey.³⁸ Recent elections in Turkey have given a parliamentary majority to fundamental Islamic political parties, who tend to oppose Western ideology, to advocate creating a fundamentalist Islamic State, and to favor making closer contacts with other Muslim States.³⁹ If Turkey were a part of the Union, could such a radical change (i.e., from a secular-type society to a more fundamentalist structure) not also result in secession by Turkey from the Union?⁴⁰

Of course it can be argued that Turkey is not yet part of the

37. These elements, as mentioned previously, are cultural, historical, and economic.

38. Although, to be fair, Turkey has an ambivalent relationship with the Union and this is in fact a mutual ambivalence shared by the Union as much as by Turkey. Nonetheless, Turkey's application for membership is active and recently moved up a notch. See Press Notice, Foreign Affairs Committee, No. 31, Sess. 2001/2002 (Apr. 29, 2002).

39. See Charles A. Radin, *Islamist Party Expected to Gain Power in Turkey*, BOSTON GLOBE, Nov. 3, 2002, at A6 (outlining the anticipated results of the parliamentary election, but also pointing out that the results are always the subject of action by an army and power structure wedded to Attaturk, the founder of modern Turkey, and his view of Turkey as a secular State. Not that, of course, such a military coup would ease the difficulties for the Union, but would instead create a different set of issues).

40. Admittedly this might also pose more difficulties in distinguishing between secession and ejectment. A Member State of the Union signs on to certain fundamental democratic principles. See Consolidated TEU, *supra* note 7, art. 6, O.J. C 325/5, at 11-12 (2002). Article 6 states:

(1) The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

(2) The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

(3) The Union shall respect the national identities of its Member States.

(4) The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

Id. What are the consequences when a Member State then deviates from these principles? Would the democratic adoption of an Islamic State structure contravene these principles? Suppose the citizens of a Member State chose of their own free volition to enact a benign dictatorship? Would the Union response be ejectment or invasion to restore the Member State to its original position?

Union and certain question marks hang over whether Turkey will ever be part of the Union, perhaps for the very reasons outlined above.⁴¹ However, a similar analysis could be made of many of the applicant States, particularly of those in the first wave of new accessions. Combined with the difficulties associated with maintaining federations at the best of times, the likelihood of the Union having to grapple with the issue of secession is by no means far-fetched. Quite the contrary, the statistical odds must be relatively high.

II. IS SECESSION POSSIBLE?

Historically, most federations have had to deal with the issue of secession at some point in their past. Experience tells us that results have been mixed, and in some cases the federal experiment is still underway. The secession of the South in the United States led to a bitter civil war that took many years to overcome.⁴² Quebec's desire to negotiate a different relationship with the rest of Canada has, and continues to be, a divisive issue within that federation.⁴³ The U.S.S.R. disappeared as its component parts ceded and the center imploded through the failure of communism.⁴⁴ Maintaining federations is not an easy task, nor is success guaranteed. Sometimes the price to be paid is exceptionally high.⁴⁵

41. See *Turkey Entry Would Destroy EU* (BBC radio broadcast, Nov. 8, 2002), available at <http://news.bbc.co.uk/1/hi/world/europe/2420697> (reporting comments made by former President Giscard D'Estaing, currently Chair of the Convention on the Future of Europe, to the French paper, *LE MONDE*: "Turkey's capital was not in Europe, 95% of its population lived outside Europe, it was 'not a European country'"). The BBC further quotes the former President as saying, "[i]n my opinion [to include Turkey in a future wave of enlargement] would be the end of Europe." *Id.* Both Brussels and Turkey were quick to downplay the significance of these comments and, despite the electoral success of a fundamental Islamist party in Turkey's election, Turkey was formally put on the list of accession countries (albeit without a date). *Id.* Turkey's new administration remains eager to pursue membership. *Id.*

42. See generally BROOKS SIMPSON, *AMERICA'S CIVIL WAR* (1996); ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (2002). One might argue that the U.S. Civil War was not truly finished until *Brown v Board of Education* abolished the separate but equal doctrine in 1954 and the Great Society legislative program of President Johnson was enacted. See generally *Brown v. Board of Education*, 347 U.S. 483 (1954); JOHN A. ANDREWS III, *LYNDON JOHNSON AND THE GREAT SOCIETY* (1999).

43. See *infra* notes 108-14 and accompanying text.

44. See generally Yehuda Blum, *Russia Takes Over Soviet Union's Seat at the United Nations*, 3 *EUR. J. INT'L L.* 354 (1992).

45. In the American Civil War, over 600,000 people died. JAMES MCPHERSON, *BAT-*

In examining this issue it makes sense to first look at what the Union provides for in terms of secession, and then to analyze that in a comparative context to see what lessons can be drawn for the Union.

A. *The Treaty Provisions*

There are no treaty provisions concerning withdrawal from the Union. There are Treaty provisions concerning accession to the Union,⁴⁶ and there are Treaty provisions relating to issues where a State is delinquent in its obligations arising under Union membership,⁴⁷ but nothing in the Treaty deals with the issue of secession. The failure to deal with the issue of secession in drafting the Treaties indicates two possibilities: either the States accept that secession is not an option, or they hold that the power to withdraw from any grouping is the ultimate power of any sovereign State. Under the latter view, joining the Union could in no way change or alter the State's fundamental right to withdraw. The lack of a formal procedure for secession merely reinforces the fact that on this issue, the power of the State remains unfettered.

It is not unusual for newly established federations to lack provisions regarding the process of secession, but neither is it common. The U.S. Constitution does not expressly provide for secession. Nor is there any evidence that the debates leading to the establishment of the EU actually dealt with the issue, and it is not clear why this was the case.⁴⁸ Did the framers consider the process irreversible? We shall discuss the view of secession seen

TLE CRY OF FREEDOM: THE CIVIL WAR ERA 855 (2003). This was a huge number given the military technology of the time and the lack of a total war concept later introduced by Germany in World War II. See KLAUS HILDEBRAND, *THE THIRD REICH* (1984).

46. See Consolidated TEU, *supra* note 7, art. 49, O.J. C 325/5, at 31 (2002), 37 I.L.M. at 78 (ex. Article O).

47. See Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty] (describing failure to comply with Treaty obligations); see also STEPHEN WEATHERHILL & PAUL BEAUMONT, *EU LAW* 212-43 (3d ed. 1999).

48. See *THE ORIGINS AND DEVELOPMENT OF EUROPEAN INTEGRATION*, *supra* note 15, at 123-34 (providing a history of the negotiations leading to the establishment of the free trade area under the EEC). It is probably because of the limitation of the agreement (a common market) that the concept of withdrawal was not seen as significant. See *id.* at 130 (suggesting that the focus was on coordination of trade rather than political connotations).

nearly one-hundred years later during the Civil War,⁴⁹ but for now all we need to be concerned with is that at the time of the drafting of the U.S. Constitution, the issue of secession was not addressed. By contrast, the constitutions of the U.S.S.R.⁵⁰ and Yugoslavia⁵¹ did contain a secession process, thereby indicating that the process was not irreversible. There is little to be gained by conjecture as to why the EU does not deal with secession, since the absence of a specific process does not answer the question of whether succession is possible in any definitive or meaningful way.

Let us return to the two inferences that we can draw from the silence of the Treaty provisions on secession. If the first inference is correct — that the absence of a process of secession from the Union indicates that secession is not possible and that the process is irreversible — then all is complete and the EU has indeed created a cockroach motel. There is considerable merit to this approach. The European Coal and Steel Community Treaty (“ECSC Treaty”) was a treaty of limited duration, pre-ordained to come to an end.⁵² On the other hand, the European Economic Treaty (“EEC Treaty”) has no such limitation and is seemingly perpetual in nature.⁵³ Hence, one can cogently argue that the issue of the length of commitment to the Union was in the minds of the signatories and that they carefully distinguished between the ECSC Treaty and the EEC Treaty⁵⁴ in this regard. It

49. See *infra* notes 93-107 and accompanying text.

50. CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS (U.S.S.R.), 1977, art. 72, *reprinted in* THE CONSTITUTIONS OF THE COMMUNIST WORLD 352 (William Simons ed., 1980) [hereinafter U.S.S.R. CONSTITUTION]. The U.S.S.R. CONSTITUTION, art. 72 states: “[e]ach union republic retains the right freely to secede from the U.S.S.R.” *Id.* at 369.

51. The first Basic Principle listed in the Constitution of the Socialist Federal Republic of Yugoslavia of Feb. 21, 1974, states, “the [N]ations of Yugoslavia, proceeding from the right of every [N]ation to self-determination, including the right of secession” CONST. OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA OF FEB. 21, 1974, *reprinted in* THE CONSTITUTIONS OF THE COMMUNIST WORLD, *supra* note 50, at 428. However, there was no mechanism established for the process of secession. See *id.*

52. The ECSC Treaty was to last for fifty years from the date of creation. See Treaty establishing the European Coal and Steel Community Treaty, art. 97, April 18, 1951, 261 U.N.T.S. 140.

53. See Consolidated TEU, *supra* note 7, art. 51, O.J. C 325/5, at 31 (2002), 37 I.L.M. at 78 (ex. Article Q) (stating that the “Treaty is concluded for an unlimited period”).

54. The EEC and Euratom Treaties are of indefinite duration; only the ECSC Treaty was temporally limited.

follows that silence regarding secession or duration indicates a permanent transfer of sovereignty in accordance with the terms of that Treaty. We shall see subsequently that this rationale forms a strong element of the European Court of Justice's position on this topic.⁵⁵

For the purposes of argument however, let us assume the second inference, that the absence of any express procedure indicates that the States remain free to exercise their own sovereign right to withdraw from the Union at any stage. In many ways, not merely for the purposes of this Article, but also from a conservative interpretation of the Treaty documents, this would appear to be the safer option, for it would indeed be potentially divisive to remove such a sovereign right through the absence of an express provision to the contrary, which is what the first inference requires us to do. If the States had been willing to lose their supreme rights, presumably they would have expressed this in forthright and clear language combined with a detailed procedure as to how secession could be achieved.

This argument leads us into an issue of international law: under the Vienna Convention⁵⁶ there is an implied right to withdraw if it can be established that the parties to the Treaty intended for such a right to exist. Thus, there might be an independent right to withdraw from the EU only if the withdrawing State can establish that the parties to the agreement intended a right of withdrawal upon entering.⁵⁷ Thus, if we view the Union treaties as simply an international agreement covered by the Vienna Convention, withdrawal remains with the power of the State and the State alone.

If the Treaties do not exclude secession, and this approach appears buttressed by international law, is there anything else in

55. See *infra* notes 59-77 and accompanying text.

56. Vienna Convention on International Treaties, U.N. Doc A/Conf 39/28, U.K.T.S. 58 (1980), 8 I.L.M. 679 [hereinafter Vienna Convention].

57. See Vienna Convention, *supra* note 56, art. 56. Article 56 states:

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Id.

Union jurisprudence that might so exclude a fundamental State right, or at the very least provide a mechanism where a Member State might leave the Union? For that we need to turn to the European Court of Justice ("ECJ").

B. *The Doctrine of Supremacy within the EU*

Although there is no specific Treaty provision on the matter, the doctrine of supremacy, whereby Union law prevails in any conflict over State law, including State constitutional law, is well established.⁵⁸ The doctrine is entirely judicial and arises from the decision in *Flaminio Costa v. E.N.E.L.*⁵⁹ In that case, the European Court of Justice held that Union law would prevail over a subsequently enacted State law. Lacking a simple supremacy clause similar to that of the U.S. Constitution,⁶⁰ the court stressed that such a doctrine was needed to ensure that the objectives of the Treaty were attained, and, in particular, that Union law would be uniform throughout the States.

It is interesting to examine some of the terminology from *Costa*, since it gives a broad insight into the perception of the ECJ with respect to the nature of the Union that has a dramatic resonance if juxtaposed with the conceptual issue of secession. It is worthwhile to extract a considerable section of the judgment, which speaks for itself:

By contrast with ordinary international treaties, the EEC [Union] has created its own legal system which . . . became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a community of unlimited duration, having its

58. See generally KAREN ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW* (2001).

59. *Flaminio Costa v. E.N.E.L.*, Case 6/64, [1964] E.C.R. 585.

60. U.S. CONST. art. VI. Art. VI states:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Id. It should be noted that Article 10 of the EC Treaty does impose an obligation on Member States to ensure the fulfillment of the Treaty objectives and to refrain from measures jeopardizing these objectives. See Consolidated Version of the Treaty establishing the European Community, art. 10, O.J. C 325/33, at 42 (2002), 37 I.L.M. 79, 81 (ex Article 5) [hereinafter Consolidated EC Treaty], incorporating changes made by Treaty of Nice, *supra* note 7.

own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

It follows that . . . the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be over-ridden by domestic legal provisions, however, framed, without being deprived of its character as Community [Union] law and without the legal basis of the Community itself being called into question.

The transfer by the States from their domestic legal system to the Community [Union] legal system of the rights and obligations arising under the Treaty carries with it *a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail*.⁶¹

The jurisprudence developed since then as a result of this case has been quite dramatic.⁶² Subsequent rulings have indicated that each State court has the obligation to dis-apply its own State law in favor of Union law, even where according to the rules of its own State, such a court would not have the power to overturn a legislative act.⁶³ Moreover, the doctrine of supremacy of Union law as envisaged by the court goes further, for it provides supremacy for the lowliest of Union acts over the highest of State rules, in particular the constitutions of the various States.⁶⁴ This is clearly the case in effectively amending the unwritten constitutional structure of the United Kingdom by bestowing powers of judicial review on courts that have never previously been accepted to have such power.⁶⁵ It also operates to modify the positions of written constitutions of States such as Germany, Italy, and France, including positions on fundamental human

61. *Costa*, [1964] E.C.R. 585, 590 (emphasis added).

62. *See id.*

63. *See Int'l Handelsgesellschaft v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1125, 1134.

64. *See Amministrazione delle Finanze dello Stato v. Simmenthal*, Case 106/77, [1978] E.C.R. 629.

65. *See The Queen v. Secretary of State for Transport ex parte Factortame Ltd.*, Case C-213/89, [1990] E.C.R. I-2433, [1990] 3 C.M.L.R. 1.

rights.⁶⁶

It is important to bear in mind that this is a judicial doctrine. Again, the States had the option to introduce an express supremacy clause in the Treaty but chose not to do so. The question that must be asked then is once again, why? Again there are two choices: either 1) the States did not consider the issue, or 2) they considered the issue and determined either (a) that supremacy was implicit or (b) that supremacy was not acceptable. If the States considered the issue and believed it to be implicit within the Treaty, then the court has merely expressed what had been unexpressed. If the States did not consider the issue, then arguably it might be open to the courts to address the issue on the basis of emergent need for the efficacious operation of the Union.

If the States viewed supremacy as unacceptable, then the courts have overstepped their competency. We must dismiss this interpretation, for if the courts had so overstepped their competency, surely the States would then have taken the opportunity to revise the Treaty to expressly overrule *Costa*⁶⁷ and the line of jurisprudence it spawned. Whilst there is certainly evidence that the States, and in particular, the State courts were unhappy with the judicially developed doctrine of supremacy,⁶⁸ there was clearly no groundswell of support to expressly overrule this decision. In fact, subsequent accessions to the Union were clearly undertaken on the basis that the doctrine of supremacy was an integral element of Union membership.

In the case of Ireland, the doctrine is enshrined in the amendments to its constitution that effectively place Union membership beyond constitutional challenge.⁶⁹ Whether such an amendment is lawful is open to debate. Since the doctrine of supremacy is judicial in nature, it stems from the Union and not the States. Acts by the State which appear to give the source of authority as national rather than Union have effectively been held to be wrong, since it is not open to the States even when acting in compliance with the dictates of the Union to give the appearance that it is the State acting and not the Union.⁷⁰

66. See WEATHERHILL, *supra* note 47, at 443, 447, 449.

67. See *Flaminio Costa v. E.N.E.L.*, Case 6/64, [1964] E.C.R. 585.

68. See WEATHERHILL, *supra* note 47, at 447, 449.

69. See *BUNREACT NA HEIREANN* art. 29 (1937).

70. See *Variola v. Amministrazione Italiana delle Finanze*, Case 34/73, [1973]

This is the crux of the issue: by its very nature, a State that seeks to cede from the Union would undertake actions which conflict with Union law, and since Union law is superior to State law, the State law is overturned. Therefore, secession is impossible, since the cumulative effect of the lack of an express process of secession, when coupled with the doctrine of supremacy, would negate any State act to withdraw from the Union.⁷¹

On a less contentious issue than secession, suppose in the Irish situation, the citizens of Ireland, desirous to determine the abortion issue of their own accord, by referendum removed the relevant article that Union law was immune from constitutional attack. And let us suppose that 100% of the electorate so voted in favor. Removing it from the constitution is of no relevance to the Union, since the basis of supremacy for Union law does not reside in the Irish Constitution.⁷² Now let us suppose that a citizen goes to court and successfully seeks a national rule banning the importation of magazines from the United Kingdom that contain advertisements for abortion services on demand.⁷³ Every court in Ireland, from the lowest to the highest, is thus forced to ignore the expressly stated wishes of the people and instead to give full force and effect to the Union law under supremacy. Would it be any different if, for example, the U.K. Parliament passed a law removing itself from the Union?

The doctrine of supremacy asks the courts of each Member State for divided loyalties, and in the case of a conflict to see themselves as courts for the Union. In reality, this is a mass federalization of the State courts. This is not necessarily a bad thing, nor is it the purpose of this Article to make arguments for or against the creation of a federal European State. But the reality is that despite little expression in the agreements between Member States, a federal jurisdiction has come into being with clear rules on supremacy that appear on the surface to prevent a

E.C.R. 981, 990-91 (discussing the attempts by Member States to "enact" regulations, which are direct legislative acts of the Union. The court has held that purporting to "enact" such regulations gives rise to a false perception that such regulations are not law until so "enacted" by the Member States, clearly incorrect).

71. See ALTER, *supra* note 58 (discussing the conditions under which the power of withdrawal remains with the State under the Vienna Convention).

72. See BUNREACT NA HEIREANN, *supra* note 69, art. 29.

73. See *Soc'y for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, [1989] I.R. 753 (Ire.).

Member State from, at the very least, unilateral departure from the Union.

One final issue that needs to be dealt with is the following proposition from the court in *Costa*:

The integration into the laws of each [M]ember [S]tate of provisions which derive from the Community [Union] and more generally the terms and spirit of the Treaty make it impossible for the [S]tates, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system *accepted by them on the basis of reciprocity*.⁷⁴

This quote may provide some limited comfort and assistance to those who might suggest that the doctrine of supremacy would not extend to an act of secession, since such an act would indicate a termination of the reciprocity, which the court indicates is an essential element. Much depends on the concept of reciprocity and the extent of its application in the development of the supremacy doctrine outlined by the court. There are a number of possibilities. First, is the reciprocity that which arises on accession to the Union, or is it an ongoing concept? If it is the former, then upon secession the issue of reciprocity has been dealt with, and any subsequent attempt to deny this reciprocity is futile. If it is the latter, reciprocity is a continuing, as distinct from a singular, event; therefore, the supremacy of Union law within any State should be analyzed at a given time.

Only the latter interpretation would keep the possibility of the right of secession and Union supremacy co-existing harmoniously. A withdrawing State would presumably no longer benefit in a reciprocal context from Union membership and therefore, in the absence of this reciprocity, the doctrine of supremacy would yield as the Member State would put itself outside of the Union legal order. However, the absurdity of such an interpretation becomes immediately apparent if we apply this interpretation to issues other than secession, to the normal everyday issues of Union activity. If the issue of reciprocity is not dealt with on accession, it would mean that a State could deny the supremacy of Union law in a given area by voluntarily denying itself reciprocal benefits in that area. The court certainly never intended such to be the case, nor could it, given that

74. *Flaminio Costa v. E.N.E.L.*, Case 6/64, [1964] E.C.R. 585, 585, 592 (emphasis added).

to do so would be to destroy any reality to a supremacy concept and instead make a mockery of the doctrine. Supremacy cannot be defeated simply by voluntary State *a-la-carte* abandonment of reciprocity.

It might then be argued that an act of secession cannot be equated with partial acts of abandonment of reciprocity, but it is so fundamental in nature that it would stand alone in terms of context and demonstrate a clear and justifiable breach of the supremacy doctrine and rationale. But this argument also fails, since according to the court, accession to the Union carries with it a permanent limitation of the State's sovereign rights.⁷⁵ The court rejects the notion that Union obligations are contingent. Once a Member State of the Union, the issue is now a permanent and absolute limitation, for as the court also went on to say:

Wherever the Treaty grants the [S]tates the right to act unilaterally, it does this by clear and precise provisions Applications by [M]ember [S]tates for authority to derogate from the Treaty are subject to a special authorization procedure . . . which would lose its purpose if the [M]ember [S]tates could renounce their obligations by means of an ordinary law.⁷⁶

C. State Court Reactions

1. England

The reaction to the Court of Justice doctrine of supremacy by State courts is interesting, particularly that of the English courts. In traditional English common law, the doctrine of Parliamentary supremacy results in the lack of any substantive judicial review.⁷⁷ Government is not regulated by the restraining hand of express limits enforced through the judicial branch of the State. Rather, the legislature enjoys an absolute and unfettered discretion as to what it may legislate. Far from being an

75. See *id.* at 593.

76. *Id.* at 585, 593. The term "ordinary law" relates here to a unilaterally enacted State law, including a constitutional amendment, for the court has made it distinctly clear that the doctrine of supremacy applies to constitutional laws and principles as well as normal legislative acts.

77. See Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229 (providing a common law perspective outside of the United Kingdom).

inheritance from the Crown's limitless power, there is ample evidence that Parliamentary supremacy can owe little to the absolute power of monarch, since in English history, the monarchy never enjoyed such absolute power. On the contrary, the early institution of the Magna Carta indicated a period of substantially limited power.

All this was to change with the removal of the monarchy and the establishment of the Commonwealth under the Lord Protector, Oliver Cromwell. During this period, absolute and total power was conferred upon the people acting through their representatives in Parliament. Thus the people, in the shape of Parliament, are supreme — a position that the King could only have dreamed of. Even with the restoration of the monarchy after the interregnum, the absolute and unfettered power of Parliament remained. Early judicial indications, prior to the interregnum, that the courts could overturn laws repugnant to common law disappeared quickly, and the primacy of the legislature over the judiciary established itself firmly.⁷⁸

Bringing the picture forward into modern times, the accession of the United Kingdom to the Union required an acceptance that the Parliament was no longer supreme, but that on the contrary, Union law was supreme. This was a difficult concept to both accept and implement. It involved a substantial revision of constitutional theory. English courts now had the power to ignore the laws of Parliament that were in conflict with Union law. Although not required for the doctrine of Union supremacy, which is founded exclusively within the Union and not dependant upon any State measure, the accession of the United Kingdom to the Union is legally enacted in the European Communities Act 1972 and subsequent legislation. The relevant section reads as follows:

s.2(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom, shall be recog-

78. See generally FREDERIC W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* LONDON (Herbert A.L. Fisher ed., 1968); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Cambridge University Press 1986) (1960).

nized and available in law, and be enforced, allowed and followed accordingly⁷⁹

This provision clearly incorporates all Union law and doctrines into domestic law within the United Kingdom, including the doctrine of supremacy, which was established prior to the statute and of which the Parliament must be deemed to have notice. This was expressly accepted by the House of Lords in the *Factortame*⁸⁰ case where Lord Bridge of Harwich stated:

If the supremacy of Community [Union] law over the national law of Member States was not always inherent in the EEC (now EC) Treaty it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community [Union] Under the terms of the [European Communities] Act 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule national law found to be in conflict with any directly enforceable rule of Community [Union] law⁸¹

Clearly the House of Lords accepted the issue of Union supremacy, but there remains a difficulty: although the European Communities Act of 1972, as amended, can bestow upon the English courts the power to apply the doctrine of supremacy, is it a power conferred upon them by the Parliament or the Union? Lord Bridge's comment indicates that the conferral of power comes from the statute, not necessarily from the Union. In *McCarthy's*,⁸² Lord Denning appears to support such a conclusion as follows:

If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms, then I should have thought that it would be the duty of our courts to follow the statute of our parliament.

79. European Communities Act, 1972, c. 68 (Eng.).

80. *Regina v. Secretary of State for Transport, Ex parte Factortame Ltd.*, 1 ALL E.R. 70 (1991) (granting of interim relief—an injunction—against the operation of a State law which was in conflict with a Union law).

81. *Id.* at 84.

82. *McCarthy's Ltd. v. Smith*, 3 ALL ER 325 (1979) (holding that interpretation of equal pay legislation is to be determined based on Union intent, rather than traditional common law rules of interpretation (plain meaning)).

This quotation is at clear odds with the supremacy doctrine, which is not rooted in affirmative actions by the States but deals with a permanent and irreversible transfer of sovereignty by the States to the Union based on the new legal order that the States have created.

Denning's remarks indicate a uniquely British theory: the Parliament remains supreme, but in enacting the European Communities Act 1972, it voluntarily limited its supremacy and ability to confer upon the judiciary the power to review and hold subsequent Parliamentary legislation as void when in conflict with Union law. However, since Parliament is supreme, it retains the right to reverse the European Communities Act 1972 in whole or in part. Such a reversal would remove the right of the courts to give supremacy to Union law over State law. Denning's interpretation favors Parliament, as its transfer of sovereignty can never be permanent or irreversible due to the concept of ultimate Parliamentary supremacy. What Parliament has done it can decide to undo. Of course, this merely states the classical secessionist difficulty. Denning's logic works well, but fundamentally represents a policy choice as to which master the court serves: State or Union. For many practical reasons, the court is probably well served by choosing the Parliament.

However, it is also logical to conclude that the Parliament had made the transfer of sovereignty permanent and irreversible, for as Lord Bridge indicates, the extent of the doctrine of supremacy was well known by the time of accession by the United Kingdom. Hence, Parliament also would have understood that it would be impossible to pass a law withdrawing from the Union, since on accession the Parliament accepted that no law inconsistent with Union law would prevail and that secession is inconsistent with Union law. In fact, after a period of some 400 years, Parliament has been caught in a circular logic that most closely resembles the cockroach motel analogy. Practically of course, the courts would have to obey the State Parliament, but jurisprudentially such an approach lacks logic. If Parliament had not desired this end result, it would have been open to Parliament to expressly state that there was an opt-out clause, declaring a right to cede. In such a scenario, the transfer of sovereignty would not have been absolute or permanent. However, by legislatively passing control over to Union law and doctrine, the extent of the transfer of Parliamentary sovereignty lies within

the Union judiciary.⁸³ The Union judiciary has indicated clearly that the transfer is absolute and permanent. Only a change in the Union law or Treaties can overturn this transfer.

2. France

Under French constitutional theory, the legislature is supreme, and the judiciary is not entitled to criticize the legislature as this is seen as a breach of the separation of powers theory.⁸⁴ However, the *Conseil Constitutionnel* is charged, under the current constitution, with testing the constitutional validity of both legislative acts and treaty commitments. However, Articles 54 and 55 of the French Constitution read as follows:

Art. 54: If the Constitutional Council, on a reference from the President of the Republic, from the Prime Minister, from the President of one or the other Assembly, or from sixty deputies or sixty senators, has declared that an international com-

83. Note in particular the so-called Metric Martyrs case in the Court of Appeals. *Thoburn v. Sunderland City Council*, [2002] 1 C.M.L.R. 50. This case involved the penalizing of street traders for violating the metrication laws and selling their produce in imperial measurements (pounds and ounces) which they had been doing for many years. *See id.* at 1465. The traders appealed their prosecution to the Court of Appeal. *See id.* at 1464-68. Lord Justice Laws for the court, dismissed their appeal and stated,

In my judgment (as will now be clear) the correct analysis of that relationship involves and requires these following four propositions. (1) All the specific rights and obligations which EU law creates are by the ECA incorporated into our domestic law and rank supreme: that is, anything in our substantive law inconsistent with any of these rights and obligations is abrogated or must be modified to avoid the inconsistency. This is true even where the inconsistent municipal provision is contained in primary legislation. (2) The ECA is a constitutional statute: that is, it cannot be impliedly repealed. (3) The truth of (2) is derived, not from EU law, but purely from the law of England: the common law recognizes a category of constitutional statutes. (4) The fundamental legal basis of the United Kingdom's relationship with the EU rests with the domestic, not the European, legal powers. In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the ECA were sufficient to incorporate the measure and give it overriding effect in domestic law. But that is very far from this case.

Id. at 1495. The legal issue was refused leave of appeal to the House of Lords and the parties remained unsure whether an appeal might be more likely to result in the House of Lords overturning this fundamental right of secession.

84. Under French law, there are two key courts: the *Cour de Cassation*, dealing with private disputes and the *Conseil d'Etat* dealing with public law issues. Neither, however, has the power to overturn a legislative act. Yet, the constitution of the Fifth Republic creates a non-judicial body, the *Conseil Constitutionnel*, which does have this power.

mitment contains a clause contrary to the Constitution, authorization to ratify or approve the international commitment in question may be given only after amendment of the Constitution.⁸⁵

Art. 55: Treaties or agreements duly ratified or approved, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.⁸⁶

In the *Jacques Vabre*⁸⁷ case, the *Cour de Cassation* determined whether a Treaty provision would take precedence over a subsequent French legislative act. The *Procureur General*⁸⁸ was forthright in his exposition of the way that the court should decide:

If you restricted yourselves to deriving from Art. 55 of our constitution the primacy in the French internal system of Community law over national law you would be explaining and justifying that action as regards our country but such reasoning would suggest that it is on our Constitution and on it alone that depends the ranking of Community law in our internal legal system. . . . [If you decide this on the basis of Community law] you will . . . recognise that the transfer made by the States from their internal legal order to the Community legal order . . . involves a definitive limitation of their sovereign rights against which a subsequent unilateral act which is incompatible with the notion of Community cannot prevail.⁸⁹

Although finding in accordance with the *Procureur General* on the merits of the case, the *Cour de Cassation* was vague as to the extent that it was willing to adopt the full and inexorable logic of his reasoning, although implicit within the reasoning is a clear acceptance in fact, if not necessarily in theory, of the supremacy doctrine. Subsequent cases from this court have adopted the doctrine of supremacy, but have continued to remain vague as to its full ramifications.

In terms of the *Conseil d'Etat*, there has been considerable

85. FR. CONST. art. 54.

86. FR. CONST. art. 55.

87. *Administration des Douanes v. Societe Cafes Jacques Vabre & J Weigel et Cie S.A.R.L.*, [1975] 2 C.M.L.R. 336 [hereinafter *Jacques Vabre*].

88. The *Procureur General's* role and function is similar to that of the Advocate General in the European Court of Justice, essentially issuing an advisory opinion which the court takes into account.

89. *Jacques Vabre*, [1975] 2 C.M.L.R. at 363-64.

reluctance to accept the doctrine of supremacy, and there have been many instances of express refusal to apply the doctrine.⁹⁰ In more recent times, however, the *Conseil d'Etat* has clearly changed position,⁹¹ and a slow but steady process of accepting the doctrine of supremacy has begun.⁹² Still, there is uncertainty as to the rationale on which this changed perception is based.⁹³ On the other hand, in *Sarran et Lavacher*,⁹⁴ the court, in dealing with a non-Union treaty, found that under the terms of the constitution, international treaties were not superior to the constitution.⁹⁵

Finally, the *Conseil Constitutionnel* has flexed its muscles. The role of the *Conseil Constitutionnel* is to test the validity of legislative acts to determine that they are in accordance with constitutional provisions, and, similarly, pursuant to Articles 54 and 55, whether accession to international treaties requires constitutional modifications. The *Conseil Constitutionnel* found that adopting the Treaty of European Union would require amendment to the Constitution.⁹⁶ The Constitution has thus been amended to accommodate deeper integration of the Union and two new articles have been effectively added:

Art. 88-1: The French Republic participates in the European Communities and in the European Union, which are composed of States that have chosen freely pursuant to the treaties that have constituted these entities, to exercise certain of their competencies in common.⁹⁷

Art. 88-2: Subject to reciprocity and in accordance with the terms of the [Treaty on European Union] France agrees to the transfer of powers necessary for the establishment of European economic and monetary union. Subject to the same

90. See Union Democratique du Travail, 1980 L'Actualité Juridique Droit Administratif (ADJA) 40 (1979); Sixth Annual Report, O.J. C 330/54 (1989) (describing *Société Bernard Carant* judgment of the *Conseil d'Etat* of Apr. 27, 1988).

91. Helene Cohn, *The Conseil D'Etat: Continuing Convergence With the Court of Justice*, 16(2) EUR. L. REV. 144 (1991); Pierre Roseren, *The Application of Community Law By French Courts From 1982 to 1993*, 31 COMMON MKT. L. REV. 315 (1994).

92. See Maurice Boisdet, *Before the Conseil d'Etat*, [1991] 1 C.M.L.R. 3.

93. See *Rothmans Int'l France S.A. and Philip Morris France S.A.*, [1993] 1 C.M.L.R. 253.

94. *Sarran et Lavacher*, 1998 AJDA 1039 (1998).

95. See *id.*

96. Re Ratification of the European Union Treaty, [1993] 3 C.M.L.R. 345 (Case No. 92-308 DC before the *Conseil Constitutionnel*, decided Apr. 9, 1992).

97. This provision resulted from the decision of the *Conseil Constitutionnel*. See *id.*

reservation and in accordance with the terms of the [EC Treaty] as amended by the [Treaty on European Union] the transfer of powers necessary for the determination of rules concerning freedom or movement for persons and related matters may be agreed upon.⁹⁸

These new provisions, in particular Article 88-2, give an impression of conditional rather than absolute transfer of sovereignty. Implicit within the terminology is surely a perception that sovereignty has not been abandoned but merely loaned. Moreover the increased recourse to constitutional amendments by the *Conseil Constitutionnel* indicates that, at least in the minds of that body, the transfer of sovereignty occurs through recourse to constitutional amendment as distinct from being innate to the Union.

The French courts have still to answer the question as to what approach they would take in the event that the French legislature was to propose withdrawal from the Union. After an uneven start, it now seems clear that both the *Cour de Cassation* and the *Conseil d'Etat* have accepted the supremacy doctrine. But the extent to which it has been accepted remains open to debate. The *Procureur General's* admonition⁹⁹ states the Union position; however, the French courts have, so far, had no Lord Denning who will ask the unthinkable: to whom are the French courts beholden?

III. A COMPARATIVE ANALYSIS

Before investigating whether there is any possible process of secession in the Union, it might be illustrative to look for comparisons in other jurisdictions.¹⁰⁰ One of the interesting parallels with the European Union is that in the United States, just like that of the European Union, the States pre-dated the federation.¹⁰¹ This may make the United States a more cogent analogy

98. Decision No. 97-394 of Dec. 31, 1997.

99. See *Jacques Vabre*, [1975] 2 C.M.L.R. 336.

100. See generally *FEDERALISM AND NATIONALISM* (Murray Forsyth ed., 1989); *FEDERALISM AND THE NEW NATIONS OF AFRICA* (David P. Currie ed., 1964); Hiller, *Western Separatism in Australia and Canada: The Regional Thesis*, 5 *AUSTL.-CAN. STUD.* 39 (1987); GEOFREY SAWER, *MODERN FEDERALISM* (1976); *SECESSION, STATE AND LIBERTY* (David Gordon ed., 1998); R.L. WATTS, *NEW FEDERATIONS: EXPERIMENTS IN THE COMMONWEALTH* 305-12 (1966).

101. Under the Treaty of Paris ending the U.S. War of Independence with Great Britain, Her Majesty's Government in Article 1 recognizes the thirteen colonies as "free

than that of Canada, discussed below, since the existence of independent autonomous States does not predate the establishment of the federation in Canada.¹⁰² Part III.A will analyze the U.S. experience, while Part III.B will focus on the Canadian experience. Part III.C will discuss the applicability of the U.S. and Canadian experiences to the current European situation.

A. *The U.S. Position*

There is no express provision contained within the Constitution of the United States that permits secession. In the words of Abraham Lincoln: "Perpetuity is implied, if not expressed, in the fundamental law of all national governments. . . . [N]o government proper ever had a provision in its organic law for its own termination."¹⁰³ Of course, this issue would come into sharp focus during the Civil War and the establishment of the Confederacy by the seceding southern States.¹⁰⁴

Although few legal arguments were made to justify secession from the United States,¹⁰⁵ the matter appears to have been definitively resolved in *Texas v. White*.¹⁰⁶ In this case, the court was

sovereign and independent [S]tates." Treaty of Paris, Sept. 3, 1783, U.S.-Gr. Brit., art. 1. This may have been a tactic by Great Britain of setting up a conquer and divide scenario, which partially came true in the Civil War as Great Britain sided, albeit in a limited way, with the confederacy. *But see* RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 24 (1987) (stating that the original thirteen colonies were not States and therefore do not predate the United States).

102. *See infra* notes 120-43 and accompanying text.

103. ABRAHAM LINCOLN, *FIRST INAUGURAL ADDRESS* (Mar. 4, 1861), *reprinted in* SELECTED WRITINGS AND SPEECHES OF ABRAHAM LINCOLN 117 (T. Harry Williams ed., 1943). For Lincoln's own views including his contradictory belief in the right of revolution, see Thomas J. Pressly, *Bullets and Ballots: Lincoln and the "Right of Revolution"*, 67 AM. HIST. REV. 647, 647-62 (1962); Philip Abbott, *The Lincoln Propositions and the Spirit of Secession*, 10 STUD. AM. POL. DEV. 103, 103-29 (1996).

104. The States which sought to secede through enacted Ordinances of Secession were South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, Texas, Virginia, Arkansas, North Carolina, and Tennessee. *See* PETER PARISH, *THE AMERICAN CIVIL WAR* 67 (1975) (providing a map of seceding States with the dates they passed secession ordinances). These Ordinances of Secession were predicated upon a Declaration of Causes which sought to outline the reason for secession. *See infra* note 118 and accompanying text.

105. For subsequent analysis, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

106. *Texas v. White*, 74 U.S. (1 Wall.) 700, 724-26 (Chase, C.J. 1869) (holding the putative secession of Texas from the Union unconstitutional based on an interpretation of the federal Constitution that constituted a waiver on the part of the States, including Texas, of the right to secede). *See also* Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 501-02, 502 n.68 (1991) (discussing secession); DAVID

forced to analyze the impact of Texas' act of secession. Texas sought an injunction in federal court restraining the defendant from using Texas Indemnity Bonds issued after secession for the payment of Confederate supplies.¹⁰⁷ The central question was whether the plaintiff (the State of Texas) had authority to bring suit against the defendant in a federal court.¹⁰⁸ Also at issue was whether Texas was a State of the Union.¹⁰⁹ Defendants argued that Texas' act of secession had terminated its position as a State of the Union, and until Texas was in compliance with the provisions for Reconstruction, it could take no legal action in the federal courts. Plaintiff disagreed, arguing that the Union was effectively indissoluble. On April 15, 1869 the court offered judgment in favor of Texas. In the words of Chief Justice Salmon P. Chase:

By [the Articles of Confederation] the Union was solemnly declared to "be perpetual." And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?¹¹⁰

Of course this only deals with one element of the argument. Although it clearly states that the Union is indissoluble, and thus the Texas Ordinance of Secession without effect,¹¹¹ it brought into question whether Texas had ceased to exist. The view of the majority was that this could not happen, since

the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self government by the States. . . . [T]he preservation

CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888* (1985).

107. *White*, 74 U.S. at 717-18.

108. *Id.* at 719.

109. *Id.*

110. *Id.* at 725. This use of "perpetual" in the Articles of Confederation provides a strong basis for an implicit concept of indissolubility referred to by Abraham Lincoln in his inaugural address. See LINCOLN, *supra* note 103.

111. The Texas Ordinance of Secession states:

Consideration therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null.

White, 74 U.S. at 726.

of the States, and the maintenance of the their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of National government. The Constitution, in all its provisions, looks to *an indestructible Union, composed of indestructible States*.¹¹²

Thus the perpetual existence of both the Union and the component States was affirmed.

In many respects the Civil War was a war over conflicting visions of the role of the federation that were present in the creation of the U.S. Constitution in 1789: whether the United States should be an association of States or an entity with a strong central national government.¹¹³ The doctrine of States' rights is integral to the development of federalism in the U.S.¹¹⁴ Indeed, in the view of States' rights advocate John Calhoun, the Constitution was a compact derived from the States in their sovereign capacity, not from the people in a national capacity.¹¹⁵

Arguably, it was the national government in Washington's limited ability to exercise control over the Nation, North and South, that permitted a climate where divisions with respect to culture, economics and politics would fester and grow.¹¹⁶ Curiously, it was this ineffectiveness of the national government in enforcing the Fugitive Slave Clause¹¹⁷ that led the seceding southern States to favor States' rights over a national interest. On the other hand, southern States deeply resented any attempt by the national government to settle the slavery question, as they viewed slavery as a purely local matter.¹¹⁸

112. *Id.* at 725 (emphasis added).

113. DAVID G. SMITH, *THE CONVENTION AND THE CONSTITUTION* 35 (1965).

114. ROGER GIBBINS, *REGIONALISM: TERRITORIAL POLITICS IN THE UNITED STATES* 20 (1982).

115. *Id.* at 20 (quoting John Calhoun's statement made in 1831).

116. *Id.* at 12.

117. U.S. CONST. art. IV, § 2, cl. 3.

118. Almost all of the Declarations of Causes by the confederate States complained about federal breaches of constitutional obligations and limits. See e.g., *DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION*, reprinted in JOHN MAY & JOAN FAUNT, *SOUTH CAROLINA SECEDES* 76-81 (1960); *MISSISSIPPI, JOURNAL OF THE STATE CONVENTION* (E. Barksdale ed., 1861), available at <http://members.aol.com/jfepperson/reasons.html>. Texas argued that the federal government had failed to honor its obligations:

By the disloyalty of the Northern States and their citizens and the imbecility of the Federal Government, infamous combinations of incendiaries and outlaws have been permitted in those States and the common territory of Kansas to

Ultimately, the issue of secession was resolved through force of arms in the United States, but it seems clear that the absence of any express right to secede meant that the United States was a permanent entity. Absent success through force of arms, there was, and is, no possibility of secession.¹¹⁹ The corresponding right of the States is their perpetual existence, prohibiting the federal government from dissolving their existence, but still enabling the federal government to prevent their secession.

B. *The Canadian Situation*

The issue of secession by Quebec from Canada has a long and tortured history.¹²⁰ The Canadian experience with secession stems from the competitive interests of two European powers: Great Britain and France. France's grip on North America never proved in any way to be enduring and its first colonial attempt in North America in what is today known as Quebec ended ignominiously in defeat at the hands of the British who took the city by force of arms in 1759. Although France would never again re-establish northern colonies in North America, it left behind nearly 60,000 French colonists who were now subjected to English rule.

The Quebec Act of 1774¹²¹ provided, rather surprisingly, a fairly liberal set of protections for French culture in the newly acquired British colonies. It provided for the maintenance of French as the official language,¹²² the adoption of French civil law (as distinct from the criminal law, which was to be that of the common law),¹²³ and protection for religious exercise.¹²⁴ As the

trample upon the federal laws, to war upon the lives and property of Southern citizens in that territory, and finally, by violence and mob law, to usurp the possession of the same as exclusively the property of the Northern States.

JOURNAL OF THE SECESSION CONVENTION OF TEXAS, 1861, at 61-66 (Ernest Winkler ed., 1912), available at <http://members.aol.com/jfepperson/reasons.html>. See also The United States Civil War Center, Louisiana State University Department of Special Collections, at <http://www.cwc.lsu.edu>.

119. See James Ostrowski, *Was the Union Army's Invasion of the Confederate States a Lawful Act? An Analysis of President Lincoln's Arguments Against Secession*, in SECESSION, STATE AND LIBERTY, *supra* note 100, at 155-90; GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1955).

120. See generally DANIEL LATOUCHE, CANADA AND QUEBEC, PAST AND FUTURE: AN ESSAY (1986); EDWARD MCWHINNEY, QUEBEC AND THE CONSTITUTION 1960-1978 (1979).

121. The Quebec Act, 1774, 14 Geo. 3, c.83 (U.K.).

122. *Id.* art. VIII.

123. *Id.* arts. VIII-XI.

influence of Great Britain extended into Canada, many English settlers objected to the provisions of the Quebec Act, and in 1791 the Constitutional Act¹²⁵ split British North America into Upper and Lower Canada. Upper Canada encompassed the French speaking settlements whereas Lower Canada encompassed the English speaking settlements. Lower Canada adopted English as their language and law. Unrest against the British Army in 1837 and the subsequent government report introduced the Union Act of 1840,¹²⁶ uniting Upper and Lower Canada and establishing the primacy of English and favoring in general the English settlers.

In 1867, the time had come to reorganize British interests in North America, and the British North America Act, 1867 ("BNA Act")¹²⁷ was the outcome. It is important to note a few significant differences between the Canadian federation and that of the United States. First, as already indicated, Canada did not contain previously existing sovereign States. Quite the contrary, the Union Act of 1840 created one government over all of Canada.¹²⁸ Thus the design of the Canadian Constitution was not to conjoin independent States but rather to administratively divide an existing political unit into a federation for practical reasons. Canadian Provinces are truly fictitious entities. Second, the dynamics of federation were radically different in that one of the key areas was the need to accommodate differing traditions, French and English, within a single political entity. In particular the French minority required considerable safeguards so that its position, culture, and values would not be swamped in a federation that would be dominated by English settlers. Finally, the Canadian experiment was taking place as the American Civil War was ending. Those establishing a new federation to the north were keenly aware of the horrific costs of that war, as well as how perilously close the United States came to extinction in fighting it.¹²⁹

124. *Id.* arts. V-VI, XV.

125. The Constitution Act, 1791, 31 Geo. 3, c.31 (U.K.).

126. The Union Act, 1840, 4 Vic., c. 35 (U.K.).

127. The British North America Act, 1867, 30-31 Vic., c.3 (U.K.) [hereinafter The BNA Act].

128. The Union Act, *supra* note 126, arts. II-III.

129. On the creation of the confederation of Canada, see generally DONALD CREIGHTON, *THE ROAD TO CONFEDERATION: THE EMERGENCE OF CANADA: 1863-1867* (1965); CHRISTOPHER MOORE, *1867: HOW THE FATHERS MADE A DEAL* (1997); David

The British/Canadian analysis of the roots of the American Civil War was that the national government was not sufficiently strong when compared to the rights of the component States.¹³⁰ This could be easily remedied in the BNA Act, since the establishment of autonomous provinces within a federation would be a conferral of power as distinct from the ceding of power of an existing State. Thus, the two main dynamics that motivated the framers of the BNA Act were, first, to provide for strong national government¹³¹ and, second, to provide sufficient protection to the French minority to ensure stability in the one area of the putative federation that might cause difficulties in the future: Quebec.¹³² The BNA Act attempted to do both. First, it conferred extensive power on the national government in Ottawa, limiting the role of the Provinces and creating a strong national center of power.¹³³ Second, it carefully provided for the protection of the minority French culture, retaining the official position of the French language, legal system, and culture in Quebec.¹³⁴ The design was relatively successful and for many years, the Canadian federation prospered and more provinces joined.¹³⁵

However, the economic development of Quebec did not match its English-speaking brethren. Quebec's economic development remained tied to agriculture and natural resources, and it failed to develop sufficiently to create a vibrant middle class. Unfortunately the bulk of middle class in Quebec came from the English speaking minority for a variety of reasons, not least of which was the dominance of English commercial entities which were sufficiently powerful and wealthy to own much of the major

Schneiderman, A.V. *Dicey, Lord Watson, and the Law of the Canadian Constitution in the late Nineteenth Century*, 16 *LAW & HIST. REV.* 495 (1998).

130. GIBBINS, *supra* note 114, at 26-27.

131. *Id.*

132. *Id.* at 28. In more recent times, this contention has been disputed and that there existed a Canadian conversation which would have placed both the Provinces and the States on a co-equal basis. See G. Blaine Baker, *The Province of Post-Confederation Rights*, 45 *U. TORONTO L.J.* 77 (1995); Jennifer Smith, *Canadian Confederation and the Influence of American Federalism*, 21 *CAN. J. POL. SCI.* 443 (1988); ROBERT VIPOND, *LIBERTY AND COMMUNITY: CANADIAN FEDERALISM AND THE FAILURE OF THE CONSTITUTION* (1991).

133. The BNA Act, 1867, *supra* note 127 arts. 1-40. However, it did not necessarily create a strong national identity.

134. *Id.* arts. 92-93, 129, 133.

135. Today, Canada is the world's second largest Nation in terms of geographic area. See GIBBINS, *supra* note 114, at 8.

industries in Quebec. In the 1960s, this disparity of wealth caused significant resentment, and Quebec began a period of enforced localization of wealth in the form of nationalization of industries, huge investment in education at all levels, non-Canadian investment into Quebec, and the equivalent of aggressive affirmative action programs. While bringing Quebec into line with the more economically developed provinces of Canada, it also brought into question the role of the national government, since these beneficial changes were instigated through local action and not national action. In fact, at the request of Quebec, the Canadian government had changed the BNA Act to reduce substantially the role of the national government and to strengthen the power of the provinces.¹³⁶

Thus, by the early 1980s, Canada, having started out with a view that strong national government was to be preferred over provincial power, had moved to ceding much national power to the Provinces. In the case of Quebec, this led to a secessionist movement that no longer saw any need for a relationship with the Canadian federation. In 1980, only 40% of the Quebec population voted in favor of a proposal seeking Quebec's withdrawal from Canada. However, a modified proposal in 1995 that sought to establish a separate Quebec outside of Canada but with a continuing economic and political partnership secured a 49.5% approval in the referendum, perilously close to the 50% plus vote required for the secession of Quebec.

The closeness of the vote surprised the political establishment, and the issue of secession was brought to the Canadian Courts by the then national government of Prime Minister Jean Chretien.¹³⁷ Under the Canadian Constitution, its Supreme Court has the power to consider questions on the constitutionality and interpretation of federal or provincial law without an actual dispute being in existence. These references are not legally binding but have considerable moral authority and carry the

136. Changes included the withdrawal, or restriction, of National government from, *inter alia*, provincial control, foreign relations, equalization payments, and fiscal control. Eventually the British North America Act was repatriated to Canada as its constitution under the Canada Act 1982, c.11 (U.K.). This Act provided for the patriation of the Canadian Constitution. *See id.* All the provinces bar Quebec voted to ratify the new Constitution.

137. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, available at http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol2/huml/1998scr2_0217.html.

substantial legal weight of the court. Prime Minister Chretien's government felt that the potential for unilateral secession by Quebec had such potential to disrupt public order that it required a ruling from the Canadian Supreme Court. The Supreme Court agreed and heard the case.¹³⁸

There were three questions into which the action was to be framed, each of which is strikingly appropriate in a European Union context. First, did Quebec have the right to unilateral secession under the Canadian Constitution?¹³⁹ Second, did Quebec have an international right to unilateral secession based in international law rights of self-determination?¹⁴⁰ Finally, if there was a conflict between the Canadian Constitution and international law, which would take priority?¹⁴¹

The Canadian Constitution is silent on the issue of provincial secession.¹⁴² The court, however, reasoned that if the majority of people in any province sought to secede from the federation, then as a democratic Nation, this expression of the people could not be ignored.¹⁴³ It would behoove all parties to enter into negotiations to give effect to the democratically expressed wishes of the people of that province. Thus, the court recognized an inherent right to secede from the federation based on the democratic nature of Canada. However, it thought that this could only occur on two basic conditions: first, the democratic secession of the province must be favored by a clear majority in response to a clear question on secession.¹⁴⁴ Second, secession could only occur through negotiations involving all of Canada.¹⁴⁵ It is worthwhile to pause and look at these elements of the ruling in more detail.

The court has ruled that a Province needs to establish a "clear majority" in favor of secession. Unfortunately, the meaning of the term "clear majority" is itself not clear! Depending on

138. *Id.*

139. *See id.*

140. *See id.*

141. *See id.*

142. *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 132-39 (4th ed. 1997).

143. *See Reference re Secession of Quebec*, *supra* note 137, paras. 61-69. On the court's ruling generally, see David Mullan, *Quebec Unilateral Secession Reference: "A Ruling that Will Stand the Test of Time"*, 9 PUB. L.R. 231 (1998); Rosemary Rayfuse, *Reference re secession of Quebec from Canada: Breaking up is hard to do*, 21 U. NEW S. WALES L.J. 834 (1998).

144. *Reference re Secession of Quebec*, *supra* note 137, paras. 86-87.

145. *Id.* paras. 88-90.

who is arguing, a "clear majority" could be 50% plus one or something significantly more, say 66.6%. It would appear that the phrase "clear majority" must mean something more than simply a majority. Certainly the United Kingdom has in determining constitutional question both at home and in former colonies, required more than simple majorities. This was the case in the Kitts and St. Nevis' referendum¹⁴⁶ and in the 1979 referendum on Scottish devolution under Prime Minister James Callaghan, where more voted in favor of Scottish devolution than against but not enough to meet the number required for devolution.¹⁴⁷

The Court dealt more squarely with the concept of the "clear question." Here the court held that the 1995 referendum did not provide a "clear question" to the people of Quebec, since it did not ask for secession but offered something that Quebec was not able to offer — an alternative relationship with Canada. If secession is to be valid, it must be put to the people straight: remain in Canada or leave. Only if the people vote by a clear majority to leave would the issue then be negotiated.

Finally, any issue of secession would require negotiations with all of Canada. This is predicated on the fact that the secession of any one province would impact on all the provinces and the Canadian Nation. The interdependence of the Provinces is, after nearly 100 years of confederation, now clearly beyond question. To leave Canada will require a new accommodation with the remaining Provinces. Thus even if a clear majority of the people in a Province approve a clear question of secession from Canada this would not entitle the Province to unilaterally secede but simply enable it, and obligate the other Provinces, to negotiate the secession in good faith. The democratic wish to secede would be a point of departure, not a *terminus*.

The court then dealt with the issue of whether a Province would have a unilateral right to secede based on international law. International law does not deal with the issue of secession. However, under international law, all peoples have the right to

146. Wayne Norman, *Secession and (constitutional) democracy*, in *DEMOCRACY AND NATIONAL PLURALISM* 99 n.7 (Ferran Requejo ed., 2001) (stating that in 1998 a majority but less than the required two-thirds of voters in Nevis voted to secede).

147. See CHRISTOPHER HARVIE, *SCOTLAND AND NATIONALISM: SCOTTISH SOCIETY AND POLITICS, 1707-PRESENT* 105-06 (1999) (stating that 32.85% vote in favor of devolution, 30.78% against, and a 40% vote was required for devolution).

self-determination, and States are bound to respect that right. The net effect of the court ruling is that since the Provinces are represented both at provincial and national level, they did not constitute a peoples endowed with the right of unilateral self-determination under the principals of international law. The court felt that the peoples of the Provinces, and Quebec in particular, were not an oppressed people within the meaning of international law. On the contrary, the people of Quebec were well represented in the national government at all levels and had substantial political choices that they could freely exercise. They were also full participants in the economic, cultural, and social activities of their Province and the Nation. Based on this analysis, Canadian law in secession was not in conflict with any right under international law of self-determination that might have given the people of Quebec the right to unilateral secession.

All sides hailed the result as a victory, with each claiming vindication. For the separatists there was now a clear right to secede, in contrast to the situation in the United States. The Canadian federation was not perpetual. For the federalists, the right to secede was so restricted that it was the equivalent of a national decision to re-organize Canada. In truth, both sides are right. Canada is not perpetual, but its demise is a matter for all Canadians and not within the sole discretion of any component part.

C. Application of a Comparative Approach to the European Situation

There are a number of points of comparison that might be useful to make at this stage. First, like Canada and the United States, the Union has no express statement on secession. Thus, the issue of secession was not dealt with at creation of the Union in Europe, Canada, or the United States. However, the issue of secession has arisen subsequently in both Canada and the United States. It would seem highly unlikely that Europe will avoid a similar issue. Second, the legal ruling in Canada occurred before secession could become a reality, whereas the ruling in the United States came after secession had been defeated by force of arms. One can wonder how the United States Supreme Court would have ruled had it been asked to rule on secession before the Civil War. Arguably the complex nature of

the American Civil War would not have been resolved by a court ruling, but it would be an interesting hypothetical.

Finally, the Union is made up of independent sovereign States, similar to the United States, and completely unlike that of Canada. The Canadian court decision now surprisingly appears to confer upon the Provinces the ability to become independent sovereign States, even though they previously had no such existence. The position of the United States is that the independent sovereign States on entering the Union lost the right to return to their former status. The rulings of the European Court of Justice, with reference to a new legal order, leave open whether the European Court of Justice, if seized with the issue of secession, would consider that the independent existence of the States has been compromised in a manner similar to that of the United States or whether it would take the approach of the Canadian courts.

IV. A CURRENT PROCESS OF SECESSION — MEMBER STATE UNANIMITY TO SECESSION?

Legally the doctrine of supremacy, allied with the absence of a specific clause authorizing secession, renders State withdrawal theoretically impossible. Although, as a practical issue at the moment, a State determined to withdraw could not be prevented beyond force of arms, and in the absence of a European army, the Union has no such force of arms to exercise. Nevertheless, there might be a legal means of withdrawal. It would be open for all the Member States to come to some arrangement for a voluntary secession of any particular Member State.¹⁴⁸ What the Member States have created, they can presumably tear asunder. But this process raises a number of issues.

First, it would admit that the withdrawing State has no unilateral right to withdraw, but can only do so with the acquiescence of the remaining States. This itself indicates a substantial, and perhaps unforeseen, transfer of State sovereignty within the existing Union treaties. It also leads to a number of curious permutations. For example, it could mean that the acquiescence of the Republic of Ireland would be required if the United King-

148. See *supra* note 1 and accompanying text (discussing the establishment of OCT status for Greenland and the consequential secession from the EU).

dom wished to secede from the Union — a perverse turnaround on the historical relationship between those two countries.

Second, there is nothing specific within the Treaty as to the basis on which such acquiescence could be obtained. Would the States vote through qualified majority or through unanimity? The better view would be that, similar to accession, a decision to permit secession would require the unanimous approval of all the remaining States, thus conferring upon the remaining States an important veto that could be used to secure concessions in any agreement of the terms of secession. This would be particularly important with respect to a remaining State that would be deeply affected by the secession: giving it leverage not merely on the terms of secession but also in terms of internal compensatory concessions from the remaining States. A further issue remains as to what role, if any, the European Parliament would play in such a scenario. On accession, the assent of the Parliament must be obtained, and arguably it would need to give its assent to any secession. At the very least, it would surely require consultation, but what would be the role of the parliamentarians from the putative secession State?

For a variety of reasons, it might not be in the interests of the Union to permit secession, particularly where to do so would result in the establishment of an independent and non-friendly dictatorship adjoining the borders of the Union. Or let us suppose that the Member State that proposes to secede contains a substantial autonomous region within its borders that has made it very clear that it does not wish to withdraw from the Union. What would the Union do in such a scenario?

The move towards the establishment of a European army inserts another complicating factor. The existence of a European army provides the Union with the necessary force of arms to enforce its version of any possible secession of a Member State. It is hard to envisage other States authorizing Union troops to march through the streets of London as an occupying force, but less difficult to see a Union army re-establishing law and order in an east European State where the rule of law and democracy are being threatened by unstable forces hostile to the Union. Or, even more likely, the European army may be called to protect those people within a withdrawing State who wish to remain within the Union, thereby providing the invitation very often required to justify intervention.

A. The Role of a European Army

In recent times much public attention and debate has arisen with respect to the creation of a European Union army.¹⁴⁹ Although it is true to say that the establishment of such an army along lines similar to that of the United States is some way off, nonetheless, foundational work does exist and a number of agreements have been entered into between the States of the Union.¹⁵⁰ The concept of a Union army is worthy of study in its own right and almost any discussion within this Article can pay little more than lip service to the issues that such a development poses.

However, it might be worthwhile to briefly mention the role any such putative Union army might be called upon to undertake in the future. Suppose that a Member State sought to unilaterally secede from the Union and that the other States were entirely opposed to such secession. Moreover, suppose that the other States decided that they could not allow a secession that might result in the creation of a hostile and dangerous regime deep within the Union. Could the Union army be called upon to prevent by force of arms such secession?¹⁵¹ One would assume that the military forces contributed by the State that is seeking to secede unilaterally would revert to the control of their home State.¹⁵² Could the remaining elements of the Union army be called upon to intervene by force?

For many, the concept of the Union army forcibly occupy-

149. For general reading on the difficulties in establishing a Union military structure and army, see CHARLES COGAN, *THE THIRD OPTION: THE EMANCIPATION OF EUROPEAN DEFENSE 1989-2000* (2001).

150. In particular, see Consolidated TEU, *supra* note 7, art. 17, O.J. C 325/5, at 16 (2002), 37 I.L.M. at 71 (ex Article J.7).

151. Another interesting possibility raised by the Austrian situation (see *supra* notes 34-35 and accompanying text) would be the use of the European Army to remove from power an elected government in one of the Member States which sought to impose a system which was in breach of the democratic principles upon which entry to the Union is based. Suppose State X elects a government whose mandate is to impose a fascist or communist structure. Certainly the Union could presumably expel such a State from the Union for breach of its obligations. But could the Union use the army to remove such a government? This problem is worthy of even further analysis, but time and space prevent any meaningful discussion here.

152. Although, presumably, some might remain loyal to the Union. Much would probably depend on how long the Union has existed at the time of the secession, with, presumably, the longer that the Union has existed, the greater a sense of loyalty from those in the Union army who might have been born in the State seeking to secede.

ing a recalcitrant Member State seeking to exercise a right to secession is far removed from the current concerns of the Union in the establishment of such a military force. In fact, it is currently envisaged as dealing with external threats primarily. Nonetheless, once such an army is created, it may be an attractive option for internal Union use, particularly where the very existence of the Union is threatened. It is doubtful that the establishment of the United States military was ever envisaged other than for protection from the external threats posed by countries such as the United Kingdom, France, and Spain. Nonetheless, U.S. military forces were eventually used internally during the Civil War.

A quick analysis of the existing provisions with respect to military and defense issues within the Union gives a startling indicator of the possible approach that might be taken by the Union. Pursuant to Article 11 of the Treaty on European Union,

[t]he Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:

- to safeguard the common values, fundamental interests, *independence and integrity* of the Union in conformity with the principles of the United Nations Charter¹⁵³

Any unilateral secession might be deemed to violate the "independence and integrity of the Union." However, this particular provision relates primarily to foreign policy. Moreover, the ancillary defense related provisions of Article 17 confine themselves to establishing a Union military capability in the area of humanitarian, peacekeeping, and peacemaking functions.¹⁵⁴ While the Union has begun to develop and deepen its approach to a common foreign policy, it is only now beginning to turn its attention to the natural complement to such a common foreign

153. Consolidated TEU, *supra* note 7, art. 11, O.J. C 325/5, at 13-14 (2002), 37 I.L.M. at 70 (ex. Article J.1) (emphasis added).

154. The provisions require that the Union can establish a force of between 50-60,000 troops within sixty days and that this force can be sustained for a period of twelve months. It also obligates the States to create appropriate military command structures with respect to this force. The due date is 2003. *See generally* Council Decision No. 2001/78/CFSP, O.J. L 27/1 (2001) (setting up the Political and Security Committee); Council Decision No. 2001/79/CFSP, O.J. L 27/4 (2001) (setting up the Military Committee of the European Union); Council Decision No. 2001/80/CFSP, O.J. L 27/7 (2001) (setting up the Military Staff of the Union).

policy: the military might with which to enforce such a policy. Thus, while at this stage the development of a military component is somewhat rudimentary, there is currently much activity in the defensive sphere. It would be incongruous and illogical if whatever defensive policy was to emerge were to be at variance with the more mature development of a common foreign policy. Arguably, therefore, any defensive structure should have at its core, the implementation of the common foreign policy, including the maintenance of the "integrity of the Union," no matter from where the threat to such integrity might come from.

*B. The European Convention on the Constitutional
Future of the Union*

The issue of secession of course must be addressed in any fundamental reform of the Treaty basis of the Union, and this is no more readily apparent than in the current European Convention. The European Council at its meeting in Laeken, established a European Convention to investigate the future development of the Union, including the drafting of a new European Constitution.¹⁵⁵ The Convention consists of a president, two vice-presidents, a representative from each of the fifteen Member States, thirty representatives from the national parliaments, sixteen members of the European Parliament, and two members of the Commission.¹⁵⁶ The Convention is consultative in nature and it has no binding powers, but the historical tradition within the Union is for the outcomes of such conventions to be regarded highly and, albeit in modified form, acted upon.¹⁵⁷ While most attention is focused on institutional and jurisdictional reform, the issue of withdrawal has not been overlooked entirely, although a search of the Convention's website illustrates merely five submissions on the issue of withdrawal from the Union, of which only three are pertinent. Each of the suggestions exposes divergent views as to how, if at all, secession

155. Laeken Declaration on the Future of the European Union, Dec. 15, 2001, available at <http://european-convention.eu.int/pdf/LKNEN.pdf> (last visited Apr. 8, 2003).

156. Potential accession States are also represented albeit only in an observer capacity.

157. See M. Robert Badinter, *Contribution from M. Robert Badinter, alternate member of the Convention "A European Constitution"*, CONV 317/02, available at <http://register.consilium.eu.int/pdf/en/02/cv00/00317en2.pdf> (Sept. 30, 2002).

would be dealt with. However, it seems clear that all agree that secession must be dealt with in a revised constitution.

1. The Dashwood Formulation: State Primacy

First, there is the draft constitution proposed by Professor Dashwood of the United Kingdom, and submitted by the Right Honorable Mr. Peter Hain. Mr. Hain is Minister for Europe of the United Kingdom, although it should be noted that the submission is carefully made so as not to indicate that it carries either the support or concurrence of Her Majesty's government. Contained within the Dashwood draft is Article 27, which states as follows:

Art. 27(1) Any Member State may withdraw from the European Union. It shall address to the Council its notice of intention to withdraw.

Art. 27(2) The Council, meeting in the composition of Heads of State or Government and acting by unanimity shall determine, after consulting the Commission and the European Parliament, the institutional adjustments to this Treaty that such withdrawal entails.

Art. 27(3) For the purposes of this article, the Council, meeting in the composition of Heads of State or Government, and the Commission shall act without taking into account the vote of the nationals of the withdrawing Member State. The European Parliament shall act without taking into account the position of the members of Parliament elected in that State.¹⁵⁸

It is clear both from the express wording and from the attached commentary¹⁵⁹ that the issue of withdrawal is exclusively a matter for the State and that no State requires permission to withdraw — that right being the retained sovereign right of the Member State. The bulk of the draft article centers on the internal institutional re-adjustments that would be necessary in such an event and enables the constitution to be modified through unanimous action of the remaining Member States acting in consultation with Parliament.¹⁶⁰

158. Peter Hain, *Contribution of Mr. P. Hain, member of the Convention—Constitutional Treaty of the European Union*, CONV 345/02, at 46-47, available at <http://register.consilium.eu.int/pdf/en/02/cv00/00345en2.pdf> (Oct. 15, 2002).

159. *Id.* at 47.

160. Although Dashwood indicates in the commentary that the exact role of the Parliament might be enhanced, for example requiring its assent to any such modifications. *Id.*

2. The Badinter Formulation: Union Control

Second, in the submission of Robert Badinter, the issue of secession is dealt with in Article 80 of his draft proposal:

Art. 80: Any Member State may denounce this Treaty and give notice of its decision to withdraw from the European Union.

The decision of the Member State shall be made within that State in accordance with the procedure required for amendment of constitutional provisions of the highest level.

The withdrawal of the State shall not take effect until after the end of a time-period to be decided by the European Council.

During this period, the Union and the withdrawing State shall negotiate an agreement defining the withdrawal procedure and its possible consequences for the interests of the Union. The withdrawing State shall be responsible for any loss that may be suffered by the Union due to its withdrawal. In the absence of any agreement between the withdrawing State and the Council of Ministers, the Court of Justice shall be seized of the dispute. It shall also hear any actions relating to the interpretation and execution of withdrawal agreements.¹⁶¹

The clear emphasis here is that while States retain ultimate secession powers, they do so only subject to the agreement of the Union. In this formulation, secession is simply not a matter of internal reorganization, but the process and impact of secession becomes a matter of substance for the Union, dealt with by either agreement or court imposed rulings. In many ways, the Badinter formulation is more realistic than the State primacy concept of Dashwood, for the Badinter formulation expressly recognizes the practical reality that secession would have a significant impact on the Union and that such a move by any Member State would require detailed negotiation and agreement. It also provides for judicial adjudication where negotiation fails to produce agreement. At all stages in the process, therefore, the sovereign right of the State to secede from the Union remains limited and controlled by the Union constitution, in sharp contrast to the State primacy model.

Interestingly, the proposal also provides for compensation

161. Badinter, *supra* note 157, at 50.

for any loss arising to the Union, although it is unclear what this loss would cover or how it would be calculated. Presumably it includes repayment of Union subsidies, such as agricultural payments and investments in infrastructure. It is unclear whether the Union would seek recoupment of all losses from the date of accession of the withdrawing Member State. Another issue is whether repayment should be balanced by contributions received from the Member State during its period of membership. What about future losses to the Union and the remaining members? If the Badinter formulation were to be adopted, these issues would prove difficult to surmount. While the rationale behind the Badinter formulation — that State secession is a joint matter for the State and the Union — might survive, the simplistic notion of damages to be paid by the withdrawing State would require substantial elaboration.

3. The Federal Formulation: No Secession

In postulating potential models,¹⁶² Lamassoure indicates, albeit in a tangential remark, that in a federal reorganization of the Union, the rule would be once a member always a member.¹⁶³ However, this federal approach, not merely in the sphere of secession but more globally, is rejected,¹⁶⁴ as is the confederal model.¹⁶⁵ Instead, reliance is placed on a hybrid version. Ultimately, Lamassoure settles on a “community” model, which

162. See generally Alain Lamassoure, *The European Union: Four Possible Models*, CONV 235/02, available at <http://register.consilium.eu.int/pdf/en/02/cv00/00235en2.pdf> (Sept. 3, 2002).

163. See *id.* at 6. However, it is not strictly true to say that a federal form of government automatically has to prohibit secession. Of course, permitting secession must be seen as a last resort if the political will to work through problems is to be sufficiently focused.

164. See *id.* at 8. The federal model is rejected as being one unlikely to be acceptable to the people of Europe and a step too large for Nation States. Essentially, the argument is that while the people of Europe are supportive of the component parts of the Union, they may demur from a model that would present these component parts as a whole. The logic is somewhat flawed, and in reality reflects a fact that Mr. Lamassoure tends to gloss over, namely, there is sharply divided opinion within the European citizenry as to the benefits of Europe, even when viewed in its component elements. *Id.* See also WHEARE, *supra* note 19, at 85-87.

165. See Lamassoure, *supra* note 162, at 3-6. The confederal model is rejected as being unworkable as the Union enlarges. The argument is that the confederal model would greatly exacerbate the current difficulties of the Union as the number of States increased; in particular it would enlarge the democratic deficit, reduce accountability, heighten conflict between States, and so forth.

would be one where “[t]he right to withdrawal is enshrined in the constitution. It is [however] subject to strict and deterrent conditions, but every State is acknowledged to hold that right at all times.”¹⁶⁶

Returning to the issue of a federal constitutional structure for the Union, and the implication that withdrawal is not possible in such a structure, this presents a real possibility that the Union could prohibit withdrawal. It seems perfectly consistent that, if on acceding to the Union, a State is fully aware that it cannot withdraw, there is nothing wrong to holding such a State to its bargain. If the Union subsequently decided that it, as a whole, did not wish to prevent the secession of a Member State,¹⁶⁷ then it could agree to that in bilateral negotiations with the State which is withdrawing, without necessarily establishing either a precedent or procedure for withdrawal.¹⁶⁸

4. The Early Convention Formulation: Now Is Not the Time!

In the early submission of the draft constitutional framework, withdrawal was dealt with in Article 46. This stated:

This article would mention the possibility of establishing a procedure for voluntary withdrawal from the Union by decision of a Member State, and the institutional consequences of such withdrawal.¹⁶⁹

The wording of this particular Article is ambiguous to say the least. It is particularly ambiguous when viewed in light of the preceding Articles concerning accession to and suspension of Union membership.¹⁷⁰ In both accession and suspension, the term used is “*establishes*.” In juxtaposition, the phrase “would

166. *Id.* at 12. This conception would be much closer to the Badinter formulation. See Badinter, *supra* note 157.

167. It does not automatically follow that the secession of part of the federation would automatically lead to the demise of the entire Union. Although not a perfect analogy by any stretch of the imagination, the departure of Ireland (at least of the twenty-six southern counties) did not lead, as of yet, to the demise of the United Kingdom and albeit pressed by force, the Westminster Parliament acceded to the secession of Ireland, despite there being no “process” established for leaving the Union, save through an Act of Parliament.

168. Note the Irish Free State Act 1921 does not provide for a process of secession from the Union for either Scotland or Wales.

169. The European Convention, *Preliminary Draft Constitutional Treaty*, art. 46, CONV 369/02 (Oct. 28, 2002).

170. See *id.*, arts. 44 and 45 respectively.

mention the possibility of establishing" gives rise to some concern. Under the constitutional submission, the need for a specific Article of secession is not clear. Moreover, even if such an Article should be included in the constitution, it was simply on the basis of mention and possibility. In other words, any possible secession Article would impose on the States a possible obligation of establishing some sort of secession process. How likely would this be *prior* to an actual secession? If history is anything to go by, and Union history in particular, procrastination would be the order of the day. Moreover, it defies logical sense as to why, in the midst of the largest reform ever suggested for the Union, an issue as important as secession should not be settled in conjunction with the other major reforms.

5. The Revised Draft Secession Provisions under the Proposed European Constitution

In a stunning turnaround, Article 46 has been heavily revised. Simply put, it would now permit any Member State to "decide to withdraw from the European Union in accordance with its own constitutional requirements."¹⁷¹ Procedurally, such a State would have to formally notify the European Council of its decision and then enter into negotiations for the arrangements to withdraw, which would include a framework for the future relationship between the Union and the Member State. This would require approval by a qualified majority of the Council after obtaining the consent of the European Parliament.¹⁷² Somewhat curiously, it then proceeds to indicate that in any event, withdrawal will occur not later than two years following the State notification unless extended by agreement between the Member State and the European Council.¹⁷³ This looks startlingly like an outright victory for the British proposal which offered unilateral secession from the Union. Although a two year period would apply whereby the practical concerns of secession could be negotiated, each State would retain the sovereignty to secede at its own discretion.

On reflection, the proposal now before Europe is a major

171. See Draft Convention 724/03, art. I-59(1), ann. 2.

172. *Id.* at art. I-59(2) (declaring that a State seeking to withdraw can take no part in the Council or European Council discussion or decisions concerning it).

173. *Id.* at art. I-59(3).

disappointment in that it lacks the clarity of the British proposal. Under the British proposal discussed earlier, the issue of withdrawal required those left behind to come to an agreement to reorganize Union affairs to reflect the new reality. The current proposal, however, suggests differently. It has proposed a system that is vague, uncertain and carelessly worded. A quick analysis of the proposal reveals a number of significant flaws.

First, and most obvious, is the requirement for a negotiated withdrawal by the Member State. This makes sense if the secession can only legally proceed with the agreement of the Union. However, the Article proposes a two-year deadline at which point, agreement or no agreement, the secession operates. What benefit is there to any negotiation if failure to act on either side within two years will result ultimately in secession?

Second, during the two-year period, it appears as if the withdrawing State remains subject to both the burdens and benefits of the Union. Thus, it can still participate in the decision making process, making decisions as part of a group from which it is destined to leave. It could, for example, slow decisions that would benefit the members of the Union but be adverse to its own new independent status. Third, it excludes representatives of the withdrawing State from participating in Council decisions, but no mention is made of Members of the European Parliament from the withdrawing State. Are they to be excluded in the consent of the European Parliament?

Finally, this proposed two-year deadline means that a Member State could negotiate its withdrawal from the Union, without actually having withdrawn. What would occur then if that Member State withdrew its withdrawal before the two-year deadline? It would not have left the Union, so it would not have to re-apply for membership. In fact, the cost to the putative withdrawing State would be inconsequential. Withdrawal should either be unilaterally immediate or multilateral only. In proposing unilaterally delayed withdrawal, the Convention conspires to hand each Member State a power more significant, and more divisive, than that of the old Luxembourg Accords. Suppose, for example, that State X has a strong disagreement with respect to a proposal that has the support of the rest of the Union. State X would be well advised to indicate to the Council that it intends to withdraw from the Union and start the negotiations. These negotiations would require considerable effort on the part of the

Union, yet at any stage the withdrawing State could withdraw the withdrawal, provided it does so before two years have elapsed. Worse still, it might be able to persuade the European Council to extend this period, but for how long? Six months? Six years? Six decades?

One alternative interpretation of the article is that once notification to withdraw has been lodged, withdrawal happens automatically after two years unless the European Council agrees to extend this period and, consequently, that there is no right to withdraw the withdrawal notice. Such an interpretation, it is suggested, might meet the objection that the provision could be used as a negotiating tactic by a Member State. This analysis is flawed in two possible ways. First, as a matter of common sense, it should be open to a Member State to change its mind within the two-year period. If Union law applies in full during this period, what harm has been done by allowing the State to change its mind? None. It would be perverse not to allow for this. If there is no implied right to withdraw the withdrawal then arguably one should be expressly included. Failing that it would require an interpretation of the Article by the Court of Justice, and who could envisage the court denying an existing member the right to change their mind and remain in the Union? In any event, if it were to be outside the scope of the provision, the Council could use its power to extend the two-year deadline indefinitely.

Second, and more importantly, on a practical level, suppose Germany felt sufficiently upset over a single issue that it notified that it would seek withdrawal from the Union. The negotiations begin, but Germany is only concerned with respect to the single issue on which it is isolated within the Union, and simply refuses to enter into meaningful discussions about secession proper. It becomes clear that Germany would drop secession if the particular proposal it favors is adopted. Practically and logically, how would the Member States choose between losing Germany as a member of the Union and yielding on this one issue? Suppose that the rest of the Union stood strong, and Germany indicated that it wished to remain a member of the Union. Would the Union then seek a narrow interpretation of this Article so as to close the door to Germany's dropping of the withdrawal notification? Unlikely. Although if one was to switch Germany with say, Hungary, then the answer would undoubtedly be different. The

effect of withdrawal on Germany would be large to the Union, small to Germany, but vice-versa for Hungary.

Thus, almost any interpretation of this Article would be either (a) a negotiating tactic used by all States or (b) on a narrow interpretation, a charter for the larger States to yet again exercise more power over the smaller States through the threat of a-la-carte secession. No formal notification would ever need to be lodged. Whispered comments would be enough to obtain just enough compliance to the larger State's view.

The Convention's current proposals for the new Constitution are embarrassing and overly generous to larger States for which withdrawal could be more readily and credibly used as a tactic to bully the Union. France, when concerned about the issue of farm prices, used the empty chair policy that led to the Luxembourg Accords. What would make the use of this Article any less likely by a larger State? And what small State could resist the threat of departure by a larger State on whose markets it is dependant?

CONCLUSION

Perhaps Abraham Lincoln put it best when he said that "no government proper ever had a provision in its organic law for its own termination."¹⁷⁴ However, Lincoln's imperative is not merely factually incorrect,¹⁷⁵ it needs also to be read in the light of the circumstances of the time it was uttered. Sunstein argues that it is constitutionally unsound to expressly permit secession in any shape or form and that if the federation is to work, opt out clauses tend to unnecessarily weaken the enduring nature of the federation.¹⁷⁶ Most of these arguments are, however, based on an analysis of Eastern Europe soon after the fall of communism.

There are very clear choices facing the Union. The first option would be to permit absolute secession rights to the individual States. This view has merit in giving ascendancy to State sovereignty and power. However, it creates a looser association of States, which in all likelihood could not long endure. A disgrun-

174. LINCOLN, *supra* note 103, at 117.

175. See U.S.S.R. Constitution, *supra* note 50. Although to be fair, Lincoln does predate this example by some years.

176. See Sunstein, *supra* note 19, at 666-70.

tled State could use secession as a tactic to secure advantage within the Union, leading to instability. However, there are limits to this logic. A Member State could only really use the threat of departure for a major issue, otherwise it would run the risk of having its bluff called. In that way, the issue of secession becomes like a game of poker. To threaten withdrawal, the State must intend to act, and must so act, on the threat if it does not get its own way. Should the Member State make the threat and the others call its bluff, any future benefit of the threat is severely diminished. Game theory would indicate that with such high stakes, Member States will, through logical analysis and rational action, limit the threat only to such situations where the issue is so great that withdrawal is a certainty. Thus contrary to a perceived fear, probably no State would make the threat to withdraw unless it (a) felt that its national interest was threatened to a significant extent and (b) intended to act upon the threat. However, one can be certain of neither outcome and an absolutist right to secede certainly has the potential for a looser and more temporary arrangement.

The second option would be to prohibit secession entirely. This has a number of advantages in terms of creating an enduring entity with a conscious realization of perpetual existence. It would remove some of the fears that individual States might abdicate their position when the going got tough. However, such a proposal would need to be addressed clearly and directly, for it would radically alter the concept of State sovereignty within the Union. The effect of such a proposal would forever commingle the State's right to exist with the imperative of the Union's existence. While this is clearly the best option in terms of the workable nature of the Union, it may for many States be a step too far at this stage.

Finally, it may be that the submission from the Convention adopts one possible federal approach more suited to the European experiment,¹⁷⁷ expressly keeping open the primacy of the States to secede from the Union, but permitting this only on terms and conditions to be agreed with the Union and without necessarily seeking to establish a "one size fits all" process of secession. There may be sensible grounds for this, since with an

177. *See id.* at 643-46. Sunstein's analysis is confined to individual east European States. *See id.*

enlarged Union, the different reasons for secession may be so varied, and the Union interest impossible to prejudge, that every secession should be viewed as a unique event to be determined by a unique process. It would retain the sovereign rights of the States to an independent existence but *de facto* limit the ability of a State to secede, as to do so would require co-operation from the Union. It would prevent secession from being the instant response to State difficulties with the Union, which might result from an absolute right of secession.

Ultimately, no matter how a future Union constitution deals with this, if feelings are sufficiently strong and if the interests affected are sufficiently great, then force of arms will most likely be required to resolve disputes. However, one of the advantages of discussing theoretical models of secession at the stage of drafting a putative Constitution is that it forces the States to truly examine what it is they are actually creating. The degree to which secession is controlled tells us much about whether the Union is simply an association of States or a true federal Union. And resolving that now may reduce the likelihood of potential use of force later. Certainly ignoring the issue will more likely exacerbate such potential.